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State responsibility

Comments and observations received from Governments

Contents

		Page
I.	Introduction	17
II.	Comments and observations received from Governments	18
	General remarks	18
	Austria	18
	Czech Republic	21
	Denmark	21
	France	22
	Germany	23
	Ireland	24
	Mexico	25
	Mongolia	25
	Switzerland	25
	United Kingdom	26
	United States	28
	Uzbekistan	30

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Part One. Origin of international responsibility 31

Austria 31

Denmark 31

Chapter I. General principles 31

Article 1. Responsibility of a State for its internationally wrongful acts 31

France 31

Germany 32

Switzerland 33

United Kingdom 33

Proposed new paragraph 2 34

France 34

Article 2. Possibility that every State may be held to have committed an internationally wrongful act 34

Germany 34

United Kingdom 34

Article 3. Elements of an internationally wrongful act of a State 34

France 34

Germany 34

Mongolia 35

Switzerland 35

United Kingdom 35

Article 4. Characterization of an act of a State as internationally wrongful 35

Germany 35

United Kingdom 35

United States 35

Chapter II. The "Act of the State" under international law 36

Germany 36

Article 5. Attribution to the State of the conduct of its organs 36

France 36

Switzerland 37

United Kingdom 37

United States 37

Proposed new paragraph 2 37

France 37

Article 6. Irrelevance of the position of the organ in the organization of the State 38
France 38
Switzerland 38
United Kingdom 38
Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority 38
France 38
Switzerland 39
United Kingdom 39
Paragraph 1 39
France 39
United Kingdom 39
Paragraph 2 39
France 39
United Kingdom 40
Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State 40
Mongolia 40
Switzerland 40
United Kingdom 41
United States 41
Proposed new paragraph 2 41
France 41
Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization 41
France 41
Switzerland 42
United Kingdom 42
Proposed new paragraph 2 42
France 42
Proposed new paragraph 3 42
France 42
Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity 42
France 42

Switzerland 43
United Kingdom 43
Article 11. Conduct of persons not acting on behalf of the State 44
Switzerland 44
United Kingdom 44
United States 44
Article 12. Conduct of organs of another State 44
France 44
Article 13. Conduct of organs of an international organization 44
France 44
United Kingdom 44
Article 14. Conduct of organs of an insurrectional movement 45
Austria 45
United Kingdom 45
Paragraph 1 45
France 45
Paragraph 2 45
France 45
Paragraph 3 45
France 45
Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State 46
Austria 46
France 46
United Kingdom 46
Chapter III. Breach of an international obligation 46
Germany 46
United Kingdom 46
Article 16. Existence of a breach of an international obligation 47
France 47
Switzerland 47
United Kingdom 47
Article 17. Irrelevance of the origin of the international obligation breached 47
Switzerland 47

Article 18. Requirement that the international obligation be in force for the State 47
France 47
Switzerland 48
United Kingdom 48
United States 48
Paragraph 2 49
France 49
Paragraph 3 49
France 49
Paragraph 4 50
France 50
United Kingdom 50
Paragraph 5 50
France 50
United Kingdom 51
Article 19. International crimes and international delicts 51
Austria 51
Czech Republic 52
Denmark 53
France 54
Germany 55
Ireland 55
Mexico 59
Mongolia 59
Switzerland 60
United Kingdom 61
United States 61
Paragraph 2 63
Czech Republic 63
France 64
United Kingdom 64
United States 65
Uzbekistan 65

Paragraph 3 65
Czech Republic 65
France 65
United Kingdom 66
United States 66
Paragraph 4 66
France 66
Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct 67
Denmark 67
France 67
Germany 67
Switzerland 68
Article 21. Breach of an international obligation requiring the achievement of a specified result 68
Denmark 68
France 68
Germany 68
Switzerland 68
United Kingdom 68
Paragraph 2 68
United Kingdom 68
Article 22. Exhaustion of local remedies 69
France 69
Germany 69
United Kingdom 70
United States 72
Article 23. Breach of an international obligation to prevent a given event 72
Denmark 72
France 72
Germany 72
United Kingdom 72
Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time 73
France 73

Germany 73
United States 73
Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time 73
France 73
Germany 74
United Kingdom 74
United States 74
Paragraph 1 74
United Kingdom 74
Paragraph 2 75
United Kingdom 75
Paragraph 3 75
United Kingdom 75
Article 26. Moment and duration of the breach of an international obligation to prevent a given event 75
France 75
Germany 75
United States 75
Chapter IV. Implication of a State in the internationally wrongful act of another State 76
Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act 76
France 76
Germany 76
Switzerland 76
United Kingdom 76
United States 77
Article 28. Responsibility of a State for an internationally wrongful act of another State 78
Switzerland 78
Paragraph 1 78
France 78
Paragraph 2 78
France 78
Paragraph 3 79
France 79

Chapter V. Circumstances precluding wrongfulness 79
France 79
Article 29. Consent 80
France 80
United Kingdom 80
Paragraph 1 81
Austria 81
France 81
United Kingdom 81
Paragraph 2 82
Austria 82
France 82
United Kingdom 83
Article 30. Countermeasures in respect of an internationally wrongful act 83
France 83
Mexico 83
United Kingdom 84
United States 84
Article 31. *Force majeure* and fortuitous event 85
Austria 85
France 85
United Kingdom 86
Paragraph 1 86
France 86
Paragraph 2 86
France 86
Article 32. Distress 87
France 87
Mongolia 87
United Kingdom 87
Paragraph 1 88
France 88
Paragraph 2 88
France 88

Article 33. State of necessity 88
Denmark 88
France 88
United Kingdom 88
Paragraph 1 89
France 89
Paragraph 2 89
France 89
United Kingdom 89
Article 34. Self-defence 90
France 90
United Kingdom 90
Article 35. Reservation as to compensation for damage 90
Austria 90
France 90
Germany 90
United Kingdom 91
Part Two. Content, forms and degrees of international responsibility 92
Denmark 92
Chapter I. General principles 92
Article 36. Consequences of an internationally wrongful act 92
France 92
Paragraph 1 92
France 92
Paragraph 2 92
France 92
United Kingdom 92
Article 37. *Lex specialis* 93
Czech Republic 93
France 93
Germany 93
Switzerland 93
United Kingdom 93
United States 94

Article 38. Customary international law 94
France 94
Article 39. Relationship to the Charter of the United Nations 94
Czech Republic 94
France 94
Mongolia 94
United Kingdom 95
United States 95
Article 40. Meaning of injured State 96
Austria 96
France 96
Germany 96
Switzerland 97
Uzbekistan 97
Paragraph 2 97
Austria 97
France 98
Germany 98
United Kingdom 98
United States 99
Paragraph 3 100
Austria 100
Czech Republic 100
France 100
Germany 101
Switzerland 101
United States 102
Chapter II. Rights of the injured State and obligations of the State which has committed an internationally wrongful act 103
Mongolia 103
Article 41. Cessation of wrongful conduct 103
France 103
United Kingdom 103

Article 42. Reparation 103
Mongolia 103
Paragraph 1 104
France 104
Germany 104
United States 104
Paragraph 2 104
France 104
United Kingdom 104
United States 105
Paragraph 3 106
France 106
Germany 106
United Kingdom 107
United States 107
Article 43. Restitution in kind 107
France 107
United States 107
Uzbekistan 108
Article 44. Compensation 108
Denmark 108
France 108
Germany 109
Mongolia 109
United Kingdom 109
United States 109
Paragraph 1 110
France 110
Paragraph 2 110
France 110
United States 110
Article 45. Satisfaction 111
Mongolia 111

Paragraph 1 111
Germany 111
United States 111
Paragraph 2 112
Austria 112
Czech Republic 112
France 113
Switzerland 113
United States 114
Uzbekistan 114
Paragraph 3 114
United States 114
Article 46. Assurances and guarantees of non-repetition 114
Czech Republic 114
Mongolia 115
Uzbekistan 115
Chapter III. Countermeasures 115
Austria 115
Czech Republic 115
Denmark 115
France 116
Germany 116
Ireland 117
Mongolia 117
United Kingdom 117
United States 118
Article 47. Countermeasures by an injured State 118
Czech Republic 118
Denmark 118
Paragraph 1 119
France 119
Ireland 119
Paragraph 3 119
Denmark 119

France 119
Ireland 120
Article 48. Conditions relating to resort to countermeasures 120
Czech Republic 120
Denmark 120
France 120
Ireland 121
Switzerland 121
United Kingdom 121
United States 122
Paragraph 1 122
Austria 122
Czech Republic 122
Denmark 122
France 123
Germany 123
United Kingdom 123
United States 124
Paragraph 2 124
Czech Republic 124
United States 125
Paragraph 3 125
United States 125
Article 49. Proportionality 125
Austria 125
Czech Republic 126
Denmark 126
France 126
Germany 126
Ireland 127
United States 128
Article 50. Prohibited countermeasures 129
Czech Republic 129
Denmark 129

Ireland 129
United Kingdom 130
United States 130
Subparagraph (a) 130
France 130
Ireland 130
Subparagraph (b) 131
France 131
Ireland 131
Switzerland 131
United Kingdom 132
United States 132
Subparagraph (c) 132
Ireland 132
Subparagraph (d) 133
Ireland 133
United Kingdom 134
United States 134
Subparagraph (e) 134
France 134
Ireland 134
United States 135
Proposal for new article 50 *bis* 135
France 135
Chapter IV. International crimes 135
Czech Republic 135
Denmark 136
France 137
Germany 137
United Kingdom 139
Article 51. Consequences of an international crime 139
Austria 139
Czech Republic 139
France 140

United Kingdom 140
Article 52. Specific consequences 140
Austria 140
Czech Republic 140
Denmark 141
France 141
Switzerland 141
United Kingdom 141
Article 53. Obligations for all States 142
Austria 142
Czech Republic 142
France 142
United Kingdom 143
Part Three. Settlement of disputes 144
Austria 144
Czech Republic 144
Denmark 144
France 145
Germany 145
Ireland 146
Mexico 146
Mongolia 146
Switzerland 147
United Kingdom 147
United States 148
Article 54. Negotiation 149
France 149
Article 55. Good offices and mediation 149
France 149
Mexico 149
Article 56. Conciliation 149
France 149
Mexico 149

Article 57. Task of the Conciliation Commission 150
France 150
Mexico 150
Paragraph 2 150
Mexico 150
Paragraph 4 150
France 150
Article 58. Arbitration 150
France 150
Paragraph 1 150
United States 150
Paragraph 2 151
Denmark 151
France 151
Germany 151
Mexico 152
United Kingdom 152
Article 59. Terms of reference of the Arbitral Tribunal 152
France 152
Mexico 152
Article 60. Validity of an arbitral award 152
France 152
Mexico 153
United States 153
Annex I. The Conciliation Commission 154
Annex II. The Arbitral Tribunal 155
France 155

I. Introduction

1. On 16 December 1996, the General Assembly adopted resolution 51/160, entitled "Report of the International Law Commission on the work of its forty-eighth session". In paragraph 5 of that resolution, the Assembly drew the attention of Governments to the importance, for the International Law Commission, of having their views on the draft articles on State responsibility adopted on first reading by the Commission[1] and urged them to present in writing their comments and observations by 1 January 1998, as requested by the Commission.

2. By a note dated 12 February 1997, the Secretary-General invited Governments to submit their comments pursuant to paragraph 5 of resolution 51/160.

3. As at 25 March 1998, replies had been received from the following 12 States (on the dates indicated): Austria (11 March 1998); Czech Republic (31 December 1997); Denmark (on behalf of the Nordic countries) (26 January 1998); France (12 December 1997); Germany (23 December 1997); Ireland (28 January 1998); Mexico (30 December 1997); Mongolia (29 December 1997); Switzerland (19 August 1997); United Kingdom of Great Britain and Northern Ireland (9 February 1998); United States of America (30 October 1997); and Uzbekistan (19 January 1998). These replies are reproduced in section II below, in an article-by-article manner. Additional replies received will be reproduced as addenda to the present report.

[1] The text of the draft articles provisionally adopted on first reading by the Commission may be found in the report of the Commission on the work of its forty-eighth session; *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10 and Corr.1, chap. III.D.1). The commentaries to the draft articles, frequently cited in the present comments, were compiled by the Secretariat from the Commission's annual reports from 1973 to 1996. See "Draft articles on State responsibility with commentaries thereto adopted by the International Law Commission on first reading" (Text consolidated by the Secretariat, January 1997, document 97-02583) (hereinafter the "Commentaries").

II. Comments and observations received from Governments

General remarks

Austria

During the past sessions of the General Assembly, Austria has attached particular importance to promoting progress in the work of the International Law Commission (ILC) as well as of the General Assembly in the field of codifying the international law on State responsibility. This progress has, in the recent years, been somewhat stalled by overloading the work on the draft articles with over-ambitious proposals which had little chance of winning adequately broad international support for their inclusion in the final instrument to be adopted.

The recent progress made with regard to this important topic is therefore welcome. For the first time in its nearly half a century-long history of dealing with this topic, the Commission during its forty-eighth session presented a conclusive and fully comprehensive set of draft articles on State responsibility. Thus the Commission has provided the community of States with a solid basis for achieving the kind of decisive progress on this topic which Austrian delegates to the General Assembly have been advocating.

The establishment by the International Law Commission of a working group on State responsibility and the decision, on the basis of its recommendations, to give appropriate priority to this topic during the next quinquennium is highly welcomed. Furthermore, the decision of the Commission to appoint Mr. James Crawford as Special Rapporteur for this topic is noted with particular satisfaction.

First of all, the objectives governing the upcoming work on State responsibility should be the following:

The rules on State responsibility should:

(a) Provide firm guidance for the conduct of States with a view to conflict prevention and resolution;

(b) Assist in determining State behaviour in order to prevent internationally wrongful acts;

(c) Take effect as soon as possible, in view of the fact that a speedy completion of this codification project seems overdue.

In keeping with these objectives, the ILC and the community of States should, from the point of view of Austria, strive for an early conclusion of the work on this subject. The finalizing of the text of the draft articles with a view to an early conclusive action should therefore have priority.

The aim of such action should be to prepare an international instrument on State responsibility which is based on broad support within the community of States. For such an instrument to have a regulatory effect in the near future, the format of an international convention is but one of the possibilities. Given the basic nature of such rules and taking into account the desirability of their widest possible acceptance by the State community, a more flexible format than a convention may prove to be more appropriate.

It must be emphasized that the legal authority of an international convention depends to a large degree on the number of ratifications. Since ratification cannot be imposed on States, the attainment of a sufficiently large number of ratifications – if this aim is to be

achieved at all – usually tends to be a relatively slow process. The form of an international convention may thus, at least for a good number of years, create a double standard in State practice among, on the one hand, States that have already ratified the convention and, on the other, those that have not. Such a double standard would clearly run counter to the principal objectives mentioned above since it would jeopardize both the conflict preventive and the conflict containing effect of rules on State responsibility. Indeed, it may even lead to new conflicts.

Thus, in Austria's opinion, a declaration of principles representing to a large extent a restatement of existing international law and State practice and providing a guide for the conduct of States may, for instance, exercise a more sustained influence on the regulation of State practice in this field than an international convention. The latter may turn out to be too rigid an instrument to gain the necessary wide-ranging acceptance within a foreseeable time-span.

Austria, however, also recognizes that the format of a convention, if a large ratification rate can be assured within a realistic period of time, still provides the most desirable result of the codification exercise on State responsibility and should therefore not be dismissed a priori. It will be the task of the General Assembly or a diplomatic conference finalizing the draft to decide which format is the most appropriate one, not excluding the possibility of adopting both a declaration of principles based on wide acceptance and having a harmonizing effect on State behaviour and a convention containing more specific provisions and procedures.

Since a declaration of principles requires a different language from that of a convention, Austria strongly favours a revision of the present draft articles which should result in two texts:

- a draft declaration of principles;
- a draft convention.

Given the fact that the majority of the existing draft articles already embody principles and could be adopted with only minor changes in the light of the comments of States, the proposed organization of work, as unconventional as it may seem, would not necessarily create a greater burden for the work of the ILC than a revision aimed solely at providing a draft convention. Instead, this format may provide the State community with an earlier chance of adopting an instrument containing basic rules on State responsibility than the present structure of the ILC's work on the topic.

As far as the substance of the draft articles is concerned, the Commission in chapter III, paragraph 30, of its report on the work of its forty-ninth session[2] requested State comments particularly on the key questions of international crimes and delicts, countermeasures and settlement of disputes, the identification of any areas requiring more work in the light of recent developments and the identification of any lacunae in the draft articles, particularly in the light of State practice.

While more detailed comments are provided below on the above-mentioned key issues and on such provisions requiring revision, Austria tends towards the conclusion that the draft is already over-comprehensive and requires some facelifting rather than the identification of additional lacunae to be filled by further provisions.

From the Austrian point of view, certain controversial provisions which run the risk of endangering a high degree of acceptability should rather be removed from the draft

[2] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10).

articles even if this is done at the expense of completeness and comprehensiveness. This is particularly true regarding the issue of "international crimes and international delicts" and probably even for certain provisions of, or even the entire part three of the draft articles.

Austria does not think that the revision of the draft articles should reopen a basic discussion of all issues, including those where general agreement is visibly emerging. Such a method of work would be likely to jeopardize the objective of a rapid conclusion of this important codification endeavour. The work of prominent international lawyers, which has been invested so far in the draft articles, should be honoured and respected also in order to avoid widening the range of unresolved issues. The existing draft articles, with only some exceptions, would already provide an excellent basis for the formulation of draft principles at the current stage. Some specific provisions, however, should either be revised or deleted for the reasons specified below.

Particular care should be given to avoiding certain legal terms the scope of which is not sufficiently determined by State practice, such as the notion of "fortuitous event". Given the fact that one of the major objectives of regulating State practice in the field of State responsibility is the avoidance of conflicts between States, unclear legal terms tend to create tensions and conflict rather than to avoid them.

...

Any progress on regulating State practice in the field of State responsibility will prove decisive in promoting peace and stability in international relations. Given the increasingly interdependent character of inter-State relations, issues of State responsibility may arise not only above, but even more so below the threshold of serious conflicts, while at the same time, carrying the danger of seriously deteriorating relations between States. To the extent to which the rules regulating State responsibility can have a stabilizing and pacifying effect on State behaviour within the foreseeable future, the codification endeavour on State responsibility may be qualified as successful.

Whatever the result of the ongoing efforts to codify the rules of international law on State responsibility, the following main objectives should govern the work of the ILC and the General Assembly in this area:

1. The rules on State responsibility should provide a decisive element of conflict prevention and resolution in international relations. They should help to influence State behaviour by minimizing instances which could develop into more serious forms of conflict among States. At the same time the rules will have to preserve the legitimate right of States to respond to violations of international law through which their rights are infringed.

2. Given the long history of the efforts of the International Law Commission to provide the international community with effective rules on State responsibility, high priority should be given to the early conclusion of the work on this topic. Efforts to revise the existing draft articles with a view to turning them into an efficient international instrument should therefore be based on an appreciation of the excellent work which has already been done by the Commission. The draft articles and the system adopted, with the exception of the elements mentioned above, provide an excellent basis for an early result of the codification efforts on State responsibility. Any revision should therefore refrain from introducing new and complicating elements into the draft articles. It should rather iron out those elements which still provide pockets of resistance against a wide acceptability of an instrument on State responsibility.

...

3. Given the priority of an early conclusion and wide acceptability, a flexible approach should be adopted as far as the format of a future instrument on State responsibility is concerned. It should be kept in mind that rules on the responsibility of States touch upon the very basis of international law and may provide it with renewed authority and power.

4. This conclusion warrants a "two-track approach":

(a) As a priority the ILC should, on the basis of the existing draft articles and comments received by States, identify such principles governing the law of State responsibility which are to be included in a universally acceptable declaration;

(b) At the same time work should continue on the revision of the draft articles with a view to elaborating an international convention.

Czech Republic

Given the great importance of the subject – which is of significance for international law in its entirety, since it involves secondary rules and will thus have a bearing on the settlement of a considerable proportion of future disputes between States – the time has come to give priority to the rapid conclusion of work on the topic so as to provide the international community with effective and reliable basic rules on State responsibility.

The set of articles resulting from the first reading is a good starting point for achieving that goal. However, it is of crucial importance to ensure that the final text has every chance of being widely accepted; this will call for good measure of pragmatism and realism, which the Commission has in fact already displayed in the past, particularly as regards the abandonment of the approaches proposed in the area of institutional machinery for the implementation of the regime of responsibility for State crimes. The form that the final outcome of the Commission's work in this area is to take will also not be immaterial; it might be advisable not to rule out, or begin to consider now, alternatives to the adoption of an international instrument requiring ratification, which could prove too inflexible to attract the active participation of a sufficient number of States within a short period of time. At the current stage of the Commission's work, it is neither necessary nor appropriate to make any drastic or entirely innovative changes in the approach to the subject as reflected in the draft or in the actual content of the text itself.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The draft articles on State responsibility as now presented in their entirety by the International Law Commission are the result of a very long drafting process, indeed, representing at the same time an impressive piece of research. This being the case, the Nordic countries would caution against reopening a new drafting process through submitting too many detailed comments and drafting points, and prefer instead to concentrate on those features in the draft articles which are known to have caused considerable trouble in the process of codifying the present topic such as the chapters on countermeasures and international crimes, as well as part three on settlement of disputes.

As to the draft as a whole, the Nordic countries believe that in general terms it captures well the present-day thinking and practice with respect to responsibility for internationally wrongful acts of States.

...

It is the hope of the Nordic countries that the International Law Commission will devote sufficient time for the second reading of this monumental topic so as to complete the work before the end of the century.

France

Before presenting its observations on the draft articles, France wishes to commend the members of the International Law Commission who worked on them, particularly the special rapporteurs. Their work even if it did not always command unanimity, was consistently interesting and thought-provoking.

The Commission's decision to submit its draft articles to all States, through the Secretary-General of the United Nations, now enables France to explain in detail why it is critical of the articles in many respects.

The set of draft articles lacks consistency and is unrealistic. The articles make it clear that the Commission is focusing more on developing legal rules applicable to State responsibility than on codification.

Giving priority to the progressive development of law is obviously not, in itself, to be criticized; but the goals of such an exercise must be achieved, and there are a number of conditions to be met. First, the exercise must respond to the wishes and concerns of States. Otherwise, the draft articles are likely to lead to a doctrinal instrument without any practical impact or to a convention that may never enter into force because it cannot attract enough ratifications. The exercise will thus have failed to achieve its goal: instead of contributing to the development of law, it will harm the Commission's prestige. During such an exercise, care must be taken not to violate substantive rules that form part of positive law, all the more so if the rules in question are in a higher category. It is essential to avoid any conflict with the Charter of the United Nations and to refrain from using any formulations that could impair its authority, in violation of Article 103 of the Charter. These two basic requirements are not met in the case under consideration.

Furthermore, a number of provisions do not belong in the draft (particularly those concerning international crimes, countermeasures and the settlement of disputes). Conversely, other issues that should have been considered in greater depth, since they are of central importance to the subject, are only touched on by the Commission (as in the case of reparation of damage). The draft is thus simultaneously overambitious and too modest in its aims. It covers issues that are extraneous to the subject, without covering the subject fully.

...

The Commission's strategic choices and ideological approaches are in fact quite perplexing. Torn between *lex lata* and *lex ferenda* and too often giving the latter precedence over the former, the Commission, which in the case under consideration too often gives in to the temptation to behave like a legislative body, ends up in an ambiguous position. The Commission's work, which has an all-pervading ideological dimension that aims to demonstrate the existence of an international public order and, what is more, to give that order a criminal connotation, cannot be regarded as expressing the *opinio juris* of States, and even less so their practice.

In sum, part one of the draft needs to be drastically amended in order to be acceptable; part two is frequently weak and not properly linked to part one; and part three is inappropriate and superfluous.

...

The draft articles suffer simultaneously from omissions (there is no reference to the concept of damage) and the introduction of unacceptable concepts (the concept of an international "crime", reference to *jus cogens*) and concepts that do not belong in a draft on State responsibility (countermeasures, settlement of disputes).

Germany

There can be no doubt that the subject of State responsibility is an extremely complex one that cuts across all of international law. It is certainly no coincidence that the topic of State responsibility has been on the agenda of the International Law Commission for over 40 years. The tremendous effort undertaken by four special rapporteurs – Messrs. Garcia-Amador, Ago, Riphagen and Arangio-Ruiz – which have translated into no less than 29 reports to date, deserve our admiration and praise. We welcome the appointment by the Commission, at its forty-ninth session, of Mr. James Crawford as the fifth Special Rapporteur on State responsibility.

Over all these years, the German Government has followed very closely the work of the Commission on the subject. It has always been our firm belief that the codification of the law on State responsibility would serve to promote stability and peace in international relations. The German Government is aware that some areas in the field of State responsibility are more developed than others. It is telling that the six successive reports presented by Mr. Garcia-Amador dealt exclusively with the question of responsibility for injuries to the persons or property of aliens[3]. Given the preponderance of arbitral decisions on the law governing the treatment of aliens, the Commission's present proposals also seem to follow largely the jurisprudence in this field and conform only to a lesser degree to actual State practice covering the entire field.

The Commission must be commended for taking into consideration the fact that inter-State relations are characterized by an increasingly high degree of interdependence and cooperation. The changing structure of international law from coexistence to cooperation[4] has certainly influenced, and continues to influence, the area of State responsibility.

The high degree of importance of the Commission's draft articles on State responsibility is demonstrated by the fact that they are already a source of inspiration and guidance for States and judicial organs, including the International Court of Justice.[5]

In view of the all-embracing importance of the subject, the German Government would urge the International Law Commission, in its efforts leading to the final adoption of the

[3] See first report, *Yearbook ... 1956*, vol. II, pp. 173 et seq.; second report, *Yearbook ... 1957*, vol. II, pp. 104 et seq.; third report, *Yearbook ... 1958*, vol. II, pp. 47 et seq.; fourth report, *Yearbook ...1959*, vol. II, p. 1 et seq.; fifth report, *Yearbook ... 1960*, vol. II, pp. 41 et seq.; sixth report, *Yearbook ... 1961*, vol. II, p. 1 et seq.

[4] See Friedmann, *The Changing Structure of International Law*, (1964), Verdross/Simma, *Universelles Völkerrecht*, 3rd ed. (1984), p. 41; Pellet, "Vive le crime! Remarques sur les degrés de l'illicite en droit international", in *International Law on the Eve of the Twenty-first Century* (1997), pp. 287, 301.

[5] See *Case concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 25 September 1997, paras. 50 et seq., paras. 83 et seq.

draft, to keep in mind that what is needed is an instrument which will command the widest possible support within the international community. It must be firmly based on customary law and State practice and not go too far beyond what is needed or indeed accepted as being the current state of the law.

...

As has been pointed out above, the draft articles adopted by the Commission represent a tremendous achievement. However, owing to the nature and complexity of the subject, the future of the project remains open.

The German Government would urge the Commission to continue its work on a set of articles with commentaries. There undoubtedly exists a solid body of customary international law on State responsibility that lends itself to codification. The commentaries to the draft articles constitute a unique source of information for the practitioner. The draft articles themselves already give guidance to States and judicial organs[6] as well.

The Commission will have to address in due course the question of whether it wants to present its final product in the format of a draft convention or rather in the format of a declaration or an expository code. The Commission will have to bear in mind that the format of the project will have an impact on part three on dispute settlement and, by extension, on part two on countermeasures as well. It will also have to consider that in the final stages of turning an ILC draft into treaty law during diplomatic negotiations, existing norms of customary international law could be put in question, bargained away or made subject to reservations. Both the International Law Commission and States will have to ensure that in the further process of codification the existing customary rules on State responsibility will be reinforced and, perhaps, completed, but not damaged.

Ireland

Responsibility for the breach of an obligation is inherent in any system of law. The Government of Ireland recognizes the fundamental nature and importance of State responsibility in the international legal system and appreciates the extensive examination of this topic by the International Law Commission. Accordingly, we are most pleased to offer some comments and observations on the draft articles.

In paragraph 30 of its report on the work of its forty-ninth session, held from 12 May to 18 July 1997, the Commission indicated a number of issues on which comments by Governments would be particularly helpful to it. They included the "key issues" of the distinction between international crimes and international delicts, countermeasures and the settlement of disputes. Our comments and observations relate to these three key issues.

...

In conclusion, the Government of Ireland reiterates its appreciation of the work of the International Law Commission on this topic of fundamental importance to the international legal system and offers these comments and observations on the draft articles on State responsibility as a contribution to the further deliberations of the Commission, without prejudice to the position which Ireland may subsequently adopt on any of the issues under consideration.

[6] Ibid.

Mexico

The Government of Mexico commends the International Law Commission on its work on the draft articles on State responsibility. Mexico invites the Commission to continue its endeavours and to make every effort to arrive at a text that will meet the requirements of the international community for the establishment of rules regulating international liability.

Nevertheless, the Government of Mexico wishes to make it clear that, in its view, it would have been preferable, for the completion of the work of regulating State responsibility and the international liability of States, to have considered, within the compass of a single instrument, both responsibility for fault and liability for risk.

Notwithstanding the foregoing, and since Mexico recognizes the innate difficulty of the drafting, negotiation and adoption process inherent in efforts to draft a single convention, it supports continuation of the work in the Commission as it is currently being undertaken, but expresses the wish that, in the current circumstances, the Commission should continue its work on the topic of liability for risk (acts not prohibited by international law).

Mongolia

Mongolia welcomes the years-long efforts of the International Law Commission to elaborate feasible articles on State responsibility. It finds acceptable, in general, the approach to the concept of State responsibility and the thrust of draft articles. Mongolia is of the view that the Commission has been careful in determining the principles which govern such responsibility. It believes that the articles, once adopted, will make an important contribution to the codification and progressive development of international law, in particular by establishing a general regime of State responsibility as compared to those already established by specific treaties.

...

Mongolia hopes that the International Law Commission will give, when revising the draft articles, particular care and attention to clarifying legal terms the scope of which are not yet sufficiently determined by State practice, such as fortuitous event, material impossibility, interim measures of protection, etc., and to the links and connection to other basic documents such as the Code of Crimes against the Peace and Security of Mankind and the statute for an international criminal court to be finalized by July 1998, as well as to the principles reflected therein.

Switzerland

The International Law Commission has just completed the first reading of its draft articles on State responsibility. This is the initial result of efforts initiated in the 1920s by the international community under the auspices of the League of Nations. One cannot underestimate the importance of this work which, although it mainly comes under the codification of the law of nations, also incorporates a number of elements that fall within the purview of the progressive development of international law. The draft articles before us today therefore represent a legal monument in the true sense of the term, bearing as they do on a question central to inter-State relations, namely, violations of international law by States and the consequences of such violations.

My delegation wishes to thank the International Law Commission for having reached the end of its work. It wishes to pay tribute to the efforts of the special rapporteurs – Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz – who have guided the Commission's work on this topic. Without them, the text would never have come into being. We can affirm here and now that the draft articles on State responsibility, whatever their ultimate fate, will serve as a vital reference point for any question arising in the field which they are intended to regulate. Some of the elements of the draft have, moreover, already become part of positive law, for example the concept embodied by the French term *fait illicite*, which has superseded the more traditional concept of the *acte illicite* (as per the first article of the draft); the distinction that is drawn between obligations of result and of conduct (articles 20 and 21); and the fact that damage defined in the traditional sense is absent from the constituent elements of an international delict.

Clearly, a draft which is designed to regulate one of the most debated areas of the law of nations cannot entirely avoid close scrutiny or even criticism. In common with others, my delegation wishes to share with you some of its far from complete thoughts on the topic. It offers these opinions in an entirely constructive spirit, i.e., with a view to contributing to the improvement, if improvement is needed, of what is in most respects an excellent piece of work.

The draft articles elaborated by the International Law Commission are very thorough and therefore very detailed. This is both an advantage and a disadvantage, for the text sometimes seems repetitive and therefore unnecessarily complicated.

United Kingdom of Great Britain and Northern Ireland

The Government of the United Kingdom commends the International Law Commission for the completion of its draft articles on State responsibility, provisionally adopted on first reading at its forty-eighth session in 1996. They welcome also the priority the Commission proposes to give to concluding this important project in its quinquennial plan. The work carried out over many years on this central topic of international law, as reflected in part in the draft articles themselves but to a large extent also in the Commentaries, has introduced valuable clarity and precision into numerous areas. Attention needs now to be focused, both by Governments and by the Commission itself, on how best to bring this major work to fruition, in the form of a generally acceptable statement of the principles of State responsibility. In the United Kingdom's view, to achieve that aim will require the modification and refinement of aspects of the Commission's draft as well as the abandonment of certain elements; it will equally require an informed discussion of the shape and nature of the final product. The United Kingdom stands ready to cooperate actively in both tasks, and looks forward to the development of a fruitful dialogue between the Commission and Governments over their accomplishment.

The United Kingdom shares the Commission's view that there have been important developments in State practice and in international jurisprudence since work on the draft articles began. They endorse the suggestion that those developments should be taken into account by the Commission in preparing its final draft.

Given the fundamental place occupied by State responsibility in the system of international law, the United Kingdom considers it essential that the outcome of the project should encourage stability and certainty in international relations. To warrant approval, the principles must be sufficiently flexible to accommodate changes in the nature of international legal relations, such as those arising from the development of international

environmental law. Flexibility for future development should however be clearly distinguished from innovation. Conscious innovation may indeed be required, for example in respect of new problems or areas of concern; but such innovation is most effectively achieved by the considered negotiation of specific instruments in particular contexts, and not by changing the underlying principles of international responsibility. To change the underlying principles may have unpredictable effects and may prove to be undesirable in particular contexts. Accordingly, the United Kingdom believes it to be of crucial importance that the Commission's draft, in its final form, reflect the established principles of customary international law grounded in the practice of States.

The United Kingdom Government does not consider it necessary or helpful to discuss in these comments the theoretical debates concerning the nature of State responsibility. States may come to an agreement on legal principles by a variety of routes; but the crucial question is whether the principles do in fact command the assent and respect of the international community. It is therefore necessary that the draft articles should not contain elements that render them unacceptable in principle to a significant part of the international community. It is also necessary that the draft articles are sufficiently practical and resilient to work effectively as the framework for day-to-day international relations. On both grounds the United Kingdom Government has concerns about parts of the current draft.

The United Kingdom Government considers that there is room for considerable improvement in the drafting of the articles. Some draft articles (such as draft articles 1, 2, 16, and 51) might usefully be combined with neighbouring draft articles or even omitted entirely. Other draft articles (such as draft articles 18, 20-26) introduce a fineness of detail and distinction which, while valuable as an analytical tool, is unnecessarily complex, and unhelpful, in an instrument that is to lay down the principles of responsibility applicable in the daily dealings between States. In yet other cases (notably the provisions on international crimes and certain provisions on countermeasures and on settlement of disputes) it seems necessary to jettison elements of the draft in their entirety if there is to be any hope of a final product which reflects what States would find acceptable.

Careful attention is also required in this context to the form the final product should take. The Commission will naturally be devoting considerable thought to this question in the course of the second reading. The United Kingdom urges the Commission to give full consideration to the entire range of possibilities provided for under the Commission's Statute and not to adopt as axiomatic a working assumption that the articles are destined to become an international convention. The United Kingdom would in fact be against any idea of proceeding towards the negotiation of a convention, for weighty reasons of substance which go beyond the sheer burden which dealing with such a subject at that level would lay on the international negotiating process. These reasons are as follows:

In the first place, to proceed by the convention route would invite the possibility that the resulting instrument would not be ratified by the overwhelming majority of the international community. Indeed, that outcome appears not only possible but even likely given the sheer difficulty of the subject matter and the consequent likelihood that a substantial number of Governments, or national parliaments, would not accept the need to grapple in abstract terms with the propositions in the text or would shy away from binding themselves to those propositions in solemn legal form. So a failure to achieve widespread ratification within a reasonably short time could only be seen as casting doubt on the soundness under general international law of the principles contained in it. The importance of the principles of State responsibility in the international legal system is such that it is highly undesirable to put their validity in question through what would appear, however unjustly, as an implicit vote of no confidence in the outcome of the Commission's work.

In the second place, the United Kingdom believes (as already indicated) that the overriding object of the exercise must be to introduce the greatest possible measure of clarity and stability into this area of the law. That would not necessarily be achieved by the adoption of an international convention which, in this very specific context, risks the creation of rigidities and inflexibilities where in fact subtlety and adaptability are required. The United Kingdom would therefore favour adoption of the final product in a form which would convey the approval of the international community and encourage reference to the principles as formulated by the Commission, but in a form which allowed for further refinement of the principles by international tribunals and in State practice by preserving a degree of flexibility in their application in concrete situations. The very difficulty the Commission has itself experienced in devising rules in terms apt for the most widely different situations (such as the unlawful use of force, environmental damage arising out of natural resource exploitation and economic wrongs) strongly suggests the advantage of allowing for the possibility of applying stable general principles in subtly different ways according to the context.

One particular area in which the need for flexible differentiation is evident is the relationship between the Commission's draft articles and other regimes of international law. The draft articles deal with many issues – for example, the right of a State to take countermeasures in the event of a breach of an obligation owed to it, the attribution of conduct to a State, and the effect of *force majeure*, material impossibility and necessity upon the duty to fulfil international obligations – that are also dealt with in the Vienna Convention on the Law of Treaties. In the *Rainbow Warrior* arbitration, and more recently in the *Gabcikovo-Nagymaros* decision of the International Court, the relationship between the basic rules of State responsibility and the specific rules applicable under the Vienna Convention to treaties has been examined. This question is not, however, addressed in the draft articles themselves. Draft article 37 states that part two of the draft articles does not oust the provisions of any *lex specialis*. But in the view of the United Kingdom Government that principle should be explicitly applied to the whole of the draft articles, and not to part two only.

Against that background there are four aspects of the draft articles that cause the United Kingdom Government particular concern, and which represent the major obstacles to the acceptability of the draft articles as a whole. They are:

(a) The provisions on international crimes;

(b) The provisions on countermeasures;

(c) The proposals concerning dispute settlement;

(d) The approach adopted by the Commission to the exhaustion of the local remedies principle.

...

The United Kingdom Government reserves the right to offer further comments at a later stage.

United States of America

The Government of the United States of America welcomes the opportunity to provide comments on the full draft articles on State responsibility prepared by the International Law Commission.

The United States agrees with the Commission that a statement of the law of State responsibility must provide guidance to States with respect to the following questions: When does an act of a State entail international responsibility? What actions are attributable to the State? What consequences flow from a State's violation of its international responsibility? Customary international law provides answers to these questions, but the Commission has in many instances not codified such norms but rather proposed new substantive rules. In particular, the sections on countermeasures, crimes, dispute settlement and State injury contain provisions that are not supported by customary international law.

Therefore, these comments first address the following areas of the draft, which, in the view of the United States, contain the most serious difficulties:

Countermeasures. While we welcome the recognition that countermeasures play an important role in the regime of State responsibility, we believe that the draft articles contain unsupported restrictions on their use.

International crimes. The United States strongly opposes the inclusion of distinctions between delicts and so-called "State crimes", for which there is no support under customary international law and which undermine the effectiveness of the State responsibility regime as a whole.

Reparation. While many of the points in the section on reparation reflect customary international law, other provisions contain qualifications that undermine the well-established principle of "full reparation".

Dispute settlement. Because of certain flaws in the dispute settlement procedure, we urge that part three be made optional.

Standing and injury. Important elements of the definition of an injured State in article 40 lack support under customary international law and would lead to undesirable consequences.

Because the articles would be used by States, tribunals and individuals, it is important that they be effective, practical and sound, which certain elements of the current draft are not. We urge the Commission to focus on developing a clear set of legal principles well-anchored in customary international law and free from excessive detail and unsubstantiated concepts.

...

Several years ago two scholars commented, with respect to the Commission's efforts to codify the law of State responsibility, that "no other codification project goes so deeply into the 'roots', the theoretical and ideological foundations of international law, or has created comparable problems".[7] Indeed, as one reviews the draft articles, it becomes clear that the project of codification deserves exceedingly careful review and revision. As these comments have indicated, the United States believes that, while there is much to be commended in the draft articles, there are also several serious and substantial flaws. To a significant degree, the draft contains provisions that do not reflect customary international law. In those cases where progressive development might be warranted, the draft articles take steps in directions that unacceptably complicate the structure of enforcement of international norms.

[7] M. Spinedi and B. Simma, "Introduction", *in* Spinedi and Simma eds., *United Nations Codification of State Responsibility* vii (1987).

If the major flaws of the draft are not addressed and corrected, it will be difficult for the project to obtain the wide support from the international community necessary for a movement towards a Convention on State responsibility.

Uzbekistan

We believe that the document as a whole is acceptable.

...

The draft articles should be followed by an instrument on the responsibility of international organizations for internationally wrongful acts.

Part One
Origin of international responsibility

Austria

Overall, Austria is satisfied with the general approach in particular of part one and the general structure adopted by the draft articles, with the exceptions specified below.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

It has been observed and is accepted that the element of fault (*culpa*) is not established as a condition for engaging the responsibility of a State whereas it is envisaged as a general factor in part two determining the legal consequences of an internationally wrongful act. To accept fault as a general condition in establishing responsibility would considerably restrict the possibility of a State being held responsible for the breach of an international obligation. Moreover, proof of wrongful intent or negligence is always very difficult. In particular, when this subjective element has to be attributed to the individual or group of individuals who acted or failed to act on behalf of a State, its research becomes uncertain and elusive. If the element of fault is relevant in establishing responsibility, it already follows from the particular rule of international law governing that situation, and not from being a constituent element of international responsibility. This applies, for instance, with regard to certain cases of omission, where responsibility arises if there has been lack of due diligence on the part of the State concerned, thereby breaching a primary rule of international law.

Chapter I. General principles

Article 1. Responsibility of a State for its internationally wrongful acts

France

More fundamentally, draft article 1 is not acceptable because it reflects the intention to set up a kind of "international public order" and to defend objective legality, instead of safeguarding the subjective rights of the State, which we see as the purpose of international responsibility.

...

Draft article 1, which states that "every internationally wrongful act of a State entails the international responsibility of that State", is one of the articles most open to criticism.

In the Sixth Committee of the General Assembly, the French delegation has regularly pointed out that the existence of damage is an indispensable element of the very definition of State responsibility and that it is an integral part thereof. It has always criticized the idea that a breach of obligations, which are ill-defined in the draft articles, is sufficient to entail the responsibility of the State.

International responsibility presupposes that, in addition to an internationally wrongful act having been perpetrated by a State, the act in question has injured another State. Accordingly, if the wrongful act of State A has not injured State B, no international responsibility of State A with respect to State B will be entailed. Without damage, there is no international responsibility. This means that a State cannot file a claim without having an identifiable, specific legal interest. The interest in question cannot merely be the interest that any State may have in other States observing international law. International responsibility is limited to the protection of the rights of the State itself; it cannot be extended to the protection of international law as such.

One of the most questionable aspects of the Commission's work has been defining international responsibility without incorporating in the definition a requirement that damage must have been caused. Supposedly, for international responsibility to be entailed, a sufficient prerequisite is that the State has breached an international obligation. France cannot endorse this approach, which is not in conformity with positive law.

It is therefore essential to adopt from the outset an approach based on the concept of damage. Damage is a constituent element of responsibility in public international law. "Legal injury" alone cannot entail the international responsibility of a State. France is therefore proposing new wording for article 1.

A number of provisions of the draft give the impression that the State is "presumed to be at fault". The State should, on the contrary, be presumed to have observed the law, in accordance with the principle of good faith. A whole series of procedural consequences flow from this presumption, particularly with respect to the burden of proof, which the draft too often ignores. Procedural guarantees are one of the most positive contributions of the codification process, without which codification has a tendency to become a purely doctrinal formulation of customary law. Regrettably, as a result of this omission, the Commission's draft is more like a doctrinal text than a draft international convention designed to govern the conduct of States.

France proposes amending this provision as follows:[8]

"[1.] Every internationally wrongful act of a State ~~entails the international responsibility of that State~~ [entails the responsibility of that State vis-à-vis the injured States]."

Germany

The German Government agrees with the "General principles" on the origin of international responsibility as contained in articles 1 to 4.

Article 1 proceeds from the basic assumption that every internationally wrongful act of a State entails the international responsibility of that State. While the German Government fully agrees with this well-accepted general principle,[9] it cannot fail to note that the circumstances under which responsibility arises and the remedies to be provided for violations cannot be divorced completely from the nature of the substantive or "primary" rules of conduct breached. Thus, for instance, the failure of a State to fulfil obligations of

[8] The drafting changes proposed by France and provisions which could be added are in square brackets and boldface. The provisions which France believes should be deleted are crossed out.

[9] See e.g. *Case of the S.S. "Wimbledon"*, *P.C.I.J., Series A*, No. 1, p. 15, *Case concerning the Factory at Chorzow* (Merits), *P.C.I.J., Series A*, No. 17, p. 29; *Corfu Channel Case* (Merits), *I.C.J. Reports 1949*, p. 23.

information, consultation, cooperation and negotiation would certainly incur a different degree of responsibility than the violation of the territorial sovereignty of another State. The procedures to be followed in seeking redress for the wrong may vary as well. Indeed, State practice shows that States in many cases refrain from invoking State responsibility and channel their grievances into a more conciliatory approach. Since "soft" obligations to consult and to cooperate are increasing in modern international law – a development that certainly is welcome – the ILC should be concerned also with the consequences of a lack of cooperation owed to other States or the international community. When States subscribe to such obligations, they do not intend and are not expected to run the risk of being subjected to a rigid regime of State responsibility.

The view that the determination of the content, form and degree of responsibility, that is, of the so-called secondary rules, is dependent on the nature of the primary rules concerned is not new to the Commission. In fact, it has been an accepted caveat, within the Commission, in its decision to restrict the topic of State responsibility to secondary rules. For instance, in presenting his preliminary report on the content, forms and degrees of international responsibility, Mr. Riphagen reminded the Commission that "in determining the new legal relationship established by a State's wrongful act, one cannot ignore the origin – in particular the conventional origin – of the international obligation breached".[10] The Commission itself, by introducing in article 19 the concepts of "international delicts" versus "international crimes", clearly admitted that primary and secondary rules are necessarily intertwined.[11] Indeed, in his third report, Mr. Riphagen went on to say that "the Commission may wish to consider the question whether even Part One does sufficiently reflect the diversity of primary rules".[12] Germany invites the Commission to take up this suggestion. In this connection, the Commission might want to consider broadening the scope of article 37 to apply to Part One of the Draft Articles as well."[13]

Switzerland

See "General remarks", above.

United Kingdom

... The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

[10] *Yearbook ... 1980*, vol. II, Part One, p. 111.

[11] See Rosenstock, "An International Criminal Responsibility of States?", in *International Law on the Eve of the Twenty-first Century*, 1997, pp. 265, 270: "[Article 19] is as clear a statement of a primary rule as one can imagine".

[12] *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/354 and Add.1 and 2, p. 28, footnote 19.

[13] Article 37 on *lex specialis* reads: "The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act."

Proposed new paragraph 2

France

France is of the view that a paragraph 2 could be included in draft article 1, making it clear that the articles do not prejudge questions which may arise with respect to injurious consequences arising out of acts not prohibited by international law.

France proposes adding a new paragraph 2 as follows:

"[2. The present articles do not prejudge questions which may arise with respect to injurious consequences arising out of acts not prohibited by international law.]"

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Germany

The German Government agrees with the "General principles" on the origin of international responsibility as contained in articles 1 to 4.

United Kingdom

Draft article 2 could well be omitted. The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

Article 3. Elements of an internationally wrongful act of a State

France

The wording of article 3 should specify that the conduct of the State which may constitute an internationally wrongful act includes both legal acts and material conduct.

...

France proposes amending subparagraph (a) as follows:

"(a) ~~conduct consisting of an action or omission is attributable to the State under international law~~ [conduct, be it a legal act or material conduct, consisting of an action or omission is attributable to the State under international law]; and"

Germany

The German Government agrees with the "General principles" on the origin of international responsibility as contained in articles 1 to 4.

Mongolia

Draft article 3 establishes elements constituting an internationally wrongful act. Mongolia fully shares the view that a breach of international obligation should give rise to liability. It nevertheless is of the view that a broader approach to international obligations may be needed to accommodate the needs of situations which otherwise will not be covered. These would include, in the first place, State obligations relating to environmental protection. These are highly important obligations: obligations of States to each other and to future generations. In this connection mention should be made of principle 21 of the 1972 Stockholm Declaration on the Human Environment which declares that States have the responsibility to ensure that activities under their jurisdiction or control do not cause damage to the environment of other States or to areas beyond their national jurisdiction.

Switzerland

See "General remarks", above.

United Kingdom

... The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

Article 4. Characterization of an act of a State as internationally wrongful

Germany

The German Government agrees with the "General principles" on the origin of international responsibility as contained in articles 1 to 4.

United Kingdom

... The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

United States

Two areas in the draft articles on attribution require refinement or clarification:

(1) The place of internal law[14]

Article 4 states the correct rule that the wrongfulness of State action "cannot be affected by the characterization of the same act as lawful by internal law". However, in the very next article, the draft provides that the definition of "State organ" depends on whether

[14] See also the comments of the United States under article 8, below.

the particular entity has "that status under the internal law of that State". Although article 4 concerns the characterization of acts while article 5 concerns the characterization of organs, the internal law loophole in article 5 effectively creates the possibility for a wrongdoing State to plead internal law as a defence to an unlawful act.

Under this formulaic rule, it could be that according to some State law, the conduct of State organs will be attributable to the State, while the conduct of identical entities in other States will not be attributable to the State.[15] The determination whether a particular entity is a State organ must be the result of a factual inquiry.[16] The United States also notes that the proviso that the organ of the State "was acting in that capacity in the case in question" is not defined. The reference to "capacity" could be read as enabling a wrongdoing State to dispute its liability on the grounds that, while the State organ committed the wrongful act, it acted outside its scope of competence. Such a reading would undermine the principle that responsibility for the action of State organs is governed by international law.

Chapter II. The "act of the State" under international law

Germany

The German Government is in general agreement with the provisions contained in chapter II of part one. Some doubts have been raised, however, as to whether the chapter in question sufficiently covers acts of natural persons and juridical persons, who, at the time of committing a violation of international law, do not act as State organs but nevertheless act under the authority and control of the State.[17] The German Government tends to share these doubts. The concept lying at the basis of chapter II seems to be rooted more in the past than in present conditions. It might not sufficiently take into account the fact that States increasingly entrust persons outside the structure of State organs with activities normally attributable to a State.[18]

Article 5. Attribution to the State of the conduct of its organs

France

The wording of article 5 is open to criticism. The term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent". The same comment applies to articles 6, 7, 9, 10, 12 and 13.

...

France proposes amending this provision as follows:

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[15] Cf. R. Ago (Special Rapporteur), *Third report on State responsibility*, A/CN.4/246/Add.2, para. 160.

[16] Compare *Barcelona Traction, Light and Power Co., Limited, I.C.J. Reports 1970*, p. 3, at pp. 38-39, with *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 626-27 (1983).

[17] See statement by the representative of Austria on 6 November 1992 at the 23rd meeting of the Sixth Committee of the General Assembly at its fifty-second session (A/C.6/52/SR.23).

[18] It is acknowledged, however, that paragraph 2 of article 7 and article 8 do introduce an element of flexibility.

"[1.] For the purposes of the present articles, ~~conduct of any State organ having that status under the internal law of that State~~ **[the conduct of any State organ or agent acting in exercise of its powers as defined by the internal law of that State]** shall be considered as an act of the State concerned under international law ~~provided that organ was acting in that capacity in the case in question~~."

Switzerland

Articles 5 to 10 of the draft defined wrongful acts attributable to the State. Article 11 and the following articles additionally list types of conduct that are not attributable to the State. Thus the draft initially focuses on the details of conduct that *are* attributable to the State, only to deal in the next instance, conversely, with conduct which is *not*. This technique could potentially detract from a text which, among other virtues, should possess that of relative simplicity.

United Kingdom

The United Kingdom Government does not consider the principles set out in these draft articles [5 and 6] to be controversial in themselves, but notes that the application of the principles might in some circumstances give rise to difficulties. Both draft articles attribute to the State the conduct of "governmental" organs. However, a problem arises from the absence of any definition in the draft articles, and of any shared international understanding, of what acts are and what are not "governmental". In some situations, for example, religious bodies may exercise a degree of authority, perhaps including the power to punish persons for breaches of religious laws, but may not formally be a part of the governmental structure of the State. There is a need for the Commission to consider whether an effective criterion of "governmental" functions can be devised and incorporated in the draft. A similar point arises in relation to draft articles 7, paragraph 2, 8(b), 9 and 10.

Draft article 5 establishes that acts of organs that are, under the municipal law of a State, organs of that State are acts of that State. If that law itself designates the organ as an organ of the State, it may be appropriate for international law to adopt a similar position. If, however, the municipal law of a State does not treat an organ as part of the State, it does not necessarily follow that the organ's acts are not attributable to the State. The municipal law cannot have determinative effect in this context: attribution is a matter for international law. The United Kingdom also observes that the principles developed in the context of State immunity are not necessarily applicable in the context of State responsibility. The United Kingdom Government hopes that the International Law Commission will clarify these points in the Commentary, and consider whether any change to the drafting of the draft articles is necessary.

See also article 7.

United States

See article 4.

Proposed new paragraph 2

France

France proposes adding a new paragraph 2 as follows:

"2. The conduct of an organ or agent of the State shall be considered as an act of that State under international law, whether that organ or agent exercises constituent, legislative, executive, judicial or other functions, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State."

Article 6. Irrelevance of the position of the organ in the organization of the State

France

The term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

Article 6 does not raise any particular difficulty. However, the distinction it establishes between functions of an international character and those of an internal character is not without ambiguity. It would, furthermore, be preferable to replace the expression "constituent, legislative, executive, judicial or other power" by "exercises constituent, legislative, executive, judicial or other functions".

...

France therefore proposes amending this provision as follows:

"The conduct of an ~~organ~~ **[an organ or agent]** of the State shall be considered as an act of that State under international law, whether that ~~organ~~ **[organ or agent]** ~~belongs to the constituent, legislative, executive, judicial or other power~~ **[exercises constituent, legislative, executive, judicial or other functions]**, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State."

Switzerland

See article 5.

United Kingdom

See article 5.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

France

The term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

Switzerland

See article 5.

United Kingdom

See articles 5 and 10.

Paragraph 1

France

Exactly what is to be understood by "territorial governmental entity" within a State? Specific mention should be made of the case of a federate State.

...

France proposes renumbering this provision as article 6 and amending paragraph 1 as follows:

"1. ~~The conduct of an organ of a territorial governmental entity within a State~~ **[The conduct of an organ or agent of a federate State or of any territorial governmental entity acting in that capacity]** shall also be considered as an act of that State under international law, ~~provided that organ was acting in that capacity in the case in question~~."

United Kingdom

The Commentary indicates that draft article 7, paragraph 1, which attributes to the State the conduct of organs of territorial government entities within the State "acting in that capacity", was not intended to result in *ultra vires* acts of State organs being *ipso facto* unattributable to the State. Draft article 10 follows this approach. This point could usefully be made clear in the text of the draft article, and not merely in the Commentary. A similar point arises in relation to draft article 5.

Paragraph 2

France

France proposes amending this paragraph as follows:

"2. ~~The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority~~, **[The conduct of an organ or agent of any entity empowered by the internal law of the State to exercise elements of the governmental authority and acting in that capacity]** shall also be considered as an act of that State under international law, ~~provided that organ was acting in that capacity in the case in question~~."

United Kingdom

Draft article 7, paragraph 2, attributes to the State the conduct of entities that are not part of the formal structure of the State but are empowered by the State's law to exercise some governmental authority. The principle set out in article 7, paragraph 2 as currently drafted appears capable of attributing to member States the conduct of organs of regional or international organizations. As a matter of European Community law (which is a part of the law of EC member States), for example, EC organs such as the European Commission have governmental powers that derive from a limitation of sovereignty and transfer of powers by member States. Those organs may be said not to be a part of the formal structure of the State, even if they have a role within the legal order of the State; and they may therefore be regarded as organs falling within article 7, paragraph 2. On the other hand, there are indications in the International Law Commission Commentary[19] that the Commission might not have intended to deal with the question of responsibility for acts of international organizations.

It is desirable that this uncertainty be resolved. In the view of the United Kingdom Government, it is desirable that this be done by a clear indication in the Commentary that these draft articles are not intended to deal with the responsibility of member States for acts of international organizations (including military actions under the auspices of international or regional organizations). That is a complex issue; and it is not clear that it is desirable that the position of every international organization be the same. The topic of responsibility for acts of international organizations merits separate, detailed treatment.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

Mongolia

The draft articles in chapter II, part one, refer to the attribution of "acts of the State" under international law. Although they seem to be skilfully drafted, Mongolia has some doubts as to the coverage of acts of natural persons, who, at the time of committing a violation of international law, do not act as State representatives but nevertheless act under the authority and control of the State. In this connection mention should be made of the trend towards broader understanding that under customary international law, as applied to environmental protection, a State is responsible for its own activities and for those of persons, whether they be individuals, private or public corporations, as long as their activities are under the State's jurisdiction or control.

Switzerland

See article 5.

[19] See e.g., *Yearbook ... 1979*, vol. II (Part Two) p. 105.

United Kingdom

The words "it established" might usefully be moved to follow the words "under international law if", so as to make clear that they apply to both subparagraph (a) and (b).

See also article 5.

United States

Two areas in the draft articles on attribution require refinement or clarification:[20]

...

(2) Persons acting on behalf of the State

Draft article 8 provides that the conduct of a person or group of persons may be attributed to the State if "it is established that such person or group of persons was in fact acting on behalf of that State". We agree with the basic thrust of this provision that a relationship between a person and a State may exist de facto even where it is difficult to pinpoint a precise legal relationship. We would note, however, that draft article 11 applies the converse rule to article 8: "The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law." This provision adds nothing to the draft. As the Commentary notes, it merely "confirms the rules laid down in the preceding articles".[21] The duplication of rules provides a tribunal with an additional, if not troublesome, question of which rule to apply in a given situation and whether the rules differ in application. Article 11 should be deleted.

Proposed new paragraph 2

France

France proposes adding a new paragraph 2 as follows:

"2. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law."

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

France

The term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

[20] See also article 4.

[21] Commentaries (op. cit., footnote 1), p. 49.

Switzerland

See article 5.

United Kingdom

Draft article 9 attributes to the State the conduct of organs placed at the State's disposal by another State or an international organization, when the organ is acting for the "borrowing" State. The United Kingdom Government notes one particular difficulty, which bears also upon draft article 22, that arises from draft article 9. In circumstances where a State's laws direct litigants to go to tribunals in other States (for example, under the Brussels Convention) or established under international organizations (for example, the International Centre for Settlement of Investment Disputes (ICSID)), it is not clear whether it is intended that the State should have any responsibility for the conduct of the Tribunal. Viewed from the perspective of attribution, the answer may appear to be no; but if the question is viewed from the perspective of the State's responsibility to "provide justice" (i.e., not to deny justice to litigants), or from the perspective of the exhaustion of local remedies rule, the answer may appear less clear. The answer may also differ according to whether the State requires, or merely permits, ligitants to have recourse to "foreign" tribunals. This is a matter that requires careful consideration, and which could perhaps be clarified through the Commentary, rather than by the amendment of the draft article itself.

See also article 5.

Proposed new paragraph 2

France

France proposes adding a new paragraph 2 as follows:

"2. The conduct of an organ or agent of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law."

Proposed new paragraph 3

France

France proposes adding a new paragraph 3 as follows:

"3. The conduct of an organ or agent of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction."

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

France

The term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

...

France proposes renumbering this provision as article 7 and reformulating it as follows:

"The conduct of the State organs or agents referred to in article 5 and of the entities referred to in article 6 shall be considered as an act of that State under international law, whether or not they have acted within their competence or complied with their instructions in accordance with the internal law of that State."

Switzerland

See article 5.

United Kingdom

Draft article 10 attributes to the State the conduct of State organs, even if they are *ultra vires*. Draft article 11 stipulates that the conduct of persons not acting on behalf of the State is not attributable to the State.

According to the Commentary,[22] draft article 11 covers the conduct of "legal persons which cannot be classified as private legal persons under the State's internal law (for example 'parastatal' or quasi-public legal persons and also other entities which are public but which have not been empowered to exercise elements of the governmental authority, or which have been so empowered only in a sector of activity other than that in which they have acted)".

This conduct is not attributable to the State. That statement implies that conduct outside the sector of activity in which a parastatal or quasi-public legal person has been empowered to exercise elements of the governmental authority is not attributable to the State. This creates a distinction between the treatment of State organs in draft article 10 and the treatment of parastatal persons in draft article 11 in relation to *ultra vires* acts, and compounds the problems arising from the use of references to exercises of "elements of governmental authority" and to organs "acting in that [governmental] capacity", noted above in relation to draft articles 7 to 10.

For example, a State may empower a private security firm to act as railway police. A railway policeman in uniform may arrest a suspected criminal (whose crime has nothing to do with the railway) in a place near to, but not a part of a railway station. As a matter of the State's internal law, the powers of the railway police may not extend to that place. Is that an example of an article 7, paragraph 2, organ exceeding its competence (in which case the conduct is attributable to the State – article 10)? Or is it an example of an article 7, paragraph 2, organ not acting in the capacity of a railway policeman, but rather in the capacity of an ordinary citizen (in which case the conduct is not attributable to the State: – article 7, paragraph 2, article 11)? The United Kingdom Government requests that the Commission consider whether, given the wide range of governmental structures in different countries, clearer guidance can be given on such problems.

See also article 5.

[22] Ibid., p. 50.

Article 11. Conduct of persons not acting on behalf of the State

Switzerland

See article 5.

United Kingdom

See article 10.

United States

See article 8.

Article 12. Conduct of organs of another State

France

The term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

...

France proposes replacing the words "an organ" in the first line by the words "an organ or agent".

Article 13. Conduct of organs of an international organization

France

The term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

United Kingdom

There are many instances of bodies established by bilateral agreements between neighbouring States as vehicles for the exercise by one State of powers in, or in relation to, the territory of the other. In the view of the United Kingdom, further consideration needs to be given to the manner in which such bilateral bodies (such as boundary waters commissions) are treated in the draft articles.

Article 14. Conduct of organs of an insurrectional movement

Austria

The issue of the conduct of organs of an insurrectional movement contained in articles 14 and 15 leaves considerable doubt and requires further consideration. This pertains in particular to articles 14, paragraph 2, and 15, paragraph 1.

United Kingdom

See article 29.

Paragraph 1

France

It would be preferable to state the principle of a presumption of State responsibility, while allowing for the possibility of exoneration in the event of *force majeure* (in the event, usurpation of government authority), the burden of proof falling on the State. France proposes new wording along these lines.

...

France proposes renumbering this provision as article 10 and reformulating it as follows:

> "The conduct of an organ or agent of an insurrectional movement in the territory of a State or in any other territory under its jurisdiction shall not be considered as an act of that State if:
>
> (a) the State in question establishes that the act is attributable to the insurrectional movement; and
>
> (b) the State in question establishes that it exercised the functions pertaining to its territorial jurisdiction over the territories concerned in a lawful manner."

Paragraph 2

France

The scope of paragraph 2 is singularly unclear. France proposes that [the paragraph] be deleted.

Paragraph 3

France

The scope of paragraph 3 is singularly unclear. France proposes that the paragraph be deleted.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new Government of a State or which results in the formation of a new State

Austria

The relationship between the first and the second sentence of article 15, paragraph 1, should for instance be re-examined in the light of the experience gained in Eastern Europe following the breakdown of the Iron Curtain and other instances of civil unrest.

See also article 14.

France

France proposes renumbering this provision as article 11.

United Kingdom

See article 29.

Chapter III. Breach of an international obligation

Germany

Chapter III of part one on the breach of an international obligation contains, apart from article 19 on delicts and crimes, a number of provisions that should be revised or redrafted.

United Kingdom

The United Kingdom Government is concerned that, throughout part one, chapter III, of the draft articles, the fineness of the distinctions drawn between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility.

The United Kingdom Government is also concerned that it may be difficult to determine the category into which a particular conduct falls. This is a general point, applicable to the distinctions drawn by the Commission between obligations of conduct and obligations of result, between the various kinds of breach, and so on.

Article 16. Existence of a breach of an international obligation

France

It would be important to allow for the instance in which State responsibility cannot be entailed inasmuch as the obligation that was originally to be complied with by the State is set aside by an obligation considered to be superior. Here France is thinking in particular of the obligations arising from the Charter of the United Nations, whose primacy over other obligations is set forth in its Article 103.

...

France proposes adding the phrase "under international law" at the end of the sentence.

Switzerland

The desire to regulate all aspects of the question is also evident in the provisions regarding breach of an international obligation. Whereas article 16 sets forth the principle, article 17 makes clear that the obligation in question may be customary, conventional or other. This clarification, although absolutely correct, adds nothing new to the principle articulated in article 16.

United Kingdom

The Government of the United Kingdom suggests that the International Law Commission might consider the possibility of combining draft article 21 with draft article 16.

Article 17. Irrelevance of the origin of the international obligation breached

Switzerland

See article 16.

Article 18. Requirement that the international obligation be in force for the State

France

See article 25.

Switzerland

The draft of the first paragraph of the article states that an international obligation cannot be breached unless it is in force at the time when the wrongful act is committed. That is self-evident and does not need to be explained.

United Kingdom

Draft article 18 lays the foundation for subsequent provisions in the draft articles by distinguishing between different kinds of acts. Paragraph 5 deals with complex acts, and paragraph 4 with composite acts. In essence, complex acts consist of actions taken by a variety of State organs in relation to a single matter, and composite acts are breaches made up of numerous individual instances, no one of which would suffice to establish the breach but which, taken together, clearly evidence the breach. The United Kingdom Government commends the International Law Commission for the precision with which it has analysed the various instances of wrongful conduct. It is, however, concerned that the draft articles have moved too far in the direction of drawing fine distinctions between different categories of conduct. It hopes that the Commission will consider how far it is necessary, and how far it is helpful, to adopt articles defining with great analytical precision different categories of wrongful conduct. It may be preferable to have a simpler conception of wrongful conduct, and leave its application in concrete instances to be worked out in State practice.

...

The United Kingdom Government hopes that the Commission might reconsider the provisions of draft article 18 and the application of the exhaustion of the local remedies principle.

United States

Draft articles 18 and 24 to 26 provide for a complex series of abstract rules governing the characterization of an act of a State as a continuing, composite, or complex act. According to this finely wrought scheme, an act of a State may only result in international responsibility if the particular obligation was in force for that State at the time of the act. This principle, stated succinctly in draft article 18, paragraph 1, holds uncontroversially that breach arises "only if the act was performed at the time when the obligation was in force for that State." Read together, however, these draft articles inject far more complexity into the draft than necessary and provide possible legal hooks for wrongdoing States to evade their obligations.

The structure of these articles will provide ample room for wrongdoing States to seek to litigate issues or avoid obligations that otherwise should be plain. Where an act has a "continuing character", the breach "extends over the entire period during which the act continues and remains not in conformity with the international obligation" (draft article 25, para. 2). There is little clue in the text or the Commentaries as to how to distinguish a continuing act from one that does not extend in time. For instance, it may be exceedingly difficult in practice to distinguish between a continuing act and an act that is complete at the moment it is "performed" (draft article 24), but that has "effects" or "consequences"

extending in time.[23] Where an act is composite, or "composed of a series of actions or omissions in respect of separate cases", the breach "extends over the entire period from the first of the actions or omissions constituting the composite act ... and so long as such actions or omissions are repeated" (draft article 25, para. 2). Where an act is complex, or "consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case", the breach "extends over the entire period between the action or omission which initiated the breach and that which completed it" (draft article 25, para. 3). The question of whether an act concerns "separate cases" or "the same case" often may be difficult to determine in practice and simply may add confusion to straightforward determinations of responsibility.

These provisions may serve to complicate rather than clarify determinations of responsibility. As Professor Brownlie has written, "the appearance of new, apparently defined, legal categories is of doubtful value. The difficult cases cannot be made less difficult by the invention of categories".[24] Consideration should be given by the Commission as to whether these provisions should be deleted because they add an unnecessary layer of complexity to the draft and risk fostering substantial abuse.

Paragraph 2

France

France proposes deleting this paragraph.

For the reasons of principle stated above, the reference to *jus cogens* in article 18, paragraph 2, ... should be deleted.

...

Paragraph 2 is problematic because, in taking up the wording of articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, it refers to the concept of a "peremptory norm of general international law", with respect to which France has a reservation in principle. Furthermore, here we seem to have a rule of peremptory law which, far from prohibiting acts, establishes an obligation to carry them out. Such a provision has no place in an article of intertemporal law.

Paragraph 3

France

France proposes renumbering this provision as paragraph 2 and adding a new second sentence as follows:

> "The breach occurs at the moment when that act begins and extends over the entire period during which the act continues."

[23] Cf. Commentaries, p.18.

[24] I. Brownlie, *System of the Law of Nations: State Responsibility* (1983), Vol. 1, pp.197-198. Cf. Joost Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", *British Year Book of International Law*, vol. LXVI (1995), pp.415-450.

Paragraph 4

France

France proposes renumbering this provision as paragraph 3 and adding a new second and third sentence as follows:

> "The breach occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. The breach extends over the entire period from the first of the relevant actions or omissions and so long as such actions or omissions are repeated."

United Kingdom

Without prejudice to that point [what was pointed out in its general comments above on the article], the Government of the United Kingdom considers that the drafting of paragraph 4 might be improved. As it is currently drafted, the rule in that provision is that there is a breach of the obligation by means of a composite act if the individual instances occurring during the period for which the obligation was in existence can be said to constitute the composite act – in other words, if the breach crystallizes out of the individual instances during that period. This is an instance where the precision of the Commission's analytical scheme may be unhelpful in practice. For example, a treaty binding upon State A might prohibit discrimination against nationals of State B. There may have been a pattern of such discrimination in the years prior to the making of the treaty. To insist that there be enough further instances of discrimination after the entry into force of the treaty to establish *de novo* the pattern of discrimination may not always be appropriate. In some cases, it is true, it may be quite proper to give State A the benefit of the doubt and to presume that it has abandoned its discriminatory practices. A single act of discrimination is not necessarily an indication that the pre-treaty practice is continuing; and it might be appropriate to place the burden of proving that an individual infraction is indeed a continuation of the pre-treaty practice upon the State asserting that it does have that character. However, it seems unnecessary to turn what might be helpful as a reasonable and rebuttable presumption into a rigid rule of law, as paragraph 4 as currently drafted does.

Paragraph 5

France

In the French version of the paragraph, the word "*complété*", which is an Anglicism, should be replaced by "*parachevé*".

...

France proposes renumbering this provision as paragraph 4 and adding a new second sentence as follows:

> "The breach occurs only at the moment when the last constituent element of that complex act is accomplished. The time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it."

United Kingdom

The draft of paragraph 5 states that there is a breach of an obligation by means of a complex act if the first element of the complex act occurred while the obligation was in force, even if the complex act continues after the obligation ceases to have effect. The principle stated in this paragraph is, in the view of the Government of the United Kingdom, correct, but not for the reason indicated by the Commission. According to the Commentary, the paragraph treats a complex act as beginning with the initial wrongful conduct and continuing through the period in which that conduct is reviewed by organs of the State until the time when the initial wrongful act is finally and definitively confirmed by the highest authority in the State. It is the understanding of the Government of the United Kingdom that in such cases the wrong is committed and completed by the initial wrongful act attributable to the State (which may itself involve actions of more than one State organ), and that the subsequent submission of the matter to other, higher authorities in the State constitutes the exhaustion of local remedies. The approach in paragraph 5 is consistent with the Commission's approach to the exhaustion of local remedies, with which the United Kingdom disagrees. That point was raised above and is explained further in relation to draft article 22.

Article 19. International crimes and international delicts

[See also part II, chapter IV.]

Austria

Austria generally recognizes the importance of international norms against particularly grave violations of international law. Austria, however, continues to hold the view that little can be gained from such a notion with a view to regulating State practice in the field of State responsibility. Austria therefore still prefers that article 19 be deleted, together with its legal consequences dealt with in articles 51 to 53. If the General Assembly adopted such articles, it would incur the danger of minimizing the acceptability of the entire set of provisions on State responsibility. The notion of international crimes would, in practice, provide tempting pretexts for defending countermeasures and sanctions of a disproportional character against minor violations of international law.

Given the fact that the notion of State crimes has thus far not been accepted in State practice and given also the need to formulate rules meeting the requirements of day-to-day practice, this notion of crimes should be abandoned. Besides, the notion of international delicts has no special importance as, technically speaking, any violation of international law entailing the responsibility of a State constitutes a delict.

The International Law Commission should rather adopt a new approach and concentrate on the regulation of the legal consequences of violations of international law of a particularly grave nature.

In general Austria prefers the results-oriented or "objective" approach adopted in other areas of the draft articles and holds the opinion that elements of domestic criminal law including wilful acts do not correspond to the concept and system of the legal relations between States. In particular, inter-State relations lack the kind of central authority necessary to decide on subjective aspects of wrongful State behaviour. In this context the instruments provided by the Charter of the United Nations, in particular Chapter VII regarding such violations of international law which threaten international peace and security, should also be taken into account.

Furthermore, State practice, including the efforts to establish an international criminal court, which are directed towards prosecuting and deterring criminal acts committed by individuals including State organs may provide a more effective tool against grave violations of basic norms of international law such as human rights and humanitarian standards than the criminalization of State behaviour as such.

Austria is conscious that it is not the only State to reject the concept of State crimes in the context of State responsibility. On the other hand, Austria is known for its strong support for efforts by the international community aiming at developing legal instruments providing for the criminal responsibility of the individual under international law for committing acts which fall under the scope of article 19 of the draft. This is one of the reasons why Austria supports the creation of an international criminal court.

Czech Republic

With regard to article 19 and the distinction between international crimes and international delicts made in that article, the Czech Republic can only reaffirm its consistent position in favour of maintaining a dichotomy of different types of internationally wrongful acts and, consequently, differentiating between the two regimes of State responsibility that such a dichotomy implies. There are rules of international law so essential for the protection of the fundamental interests of the international community that their breach – the failure to fulfil the obligations involved – calls for the application of a specific responsibility regime; in view of the exceptional gravity of such failure and the harm it causes indirectly to the very framework of the international community, it would be neither appropriate nor sufficient to apply a common regime to it, merely adjusting the regime to take account of the scale of the breach and of the amount of damage caused. The idea of a specific regime for State responsibility for certain particularly serious acts is to be found in positive law and in State practice, although at the current stage no doubt in a relatively fragmentary, unsystematic or indirect form, or merely in outline. It will suffice, in that connection, to draw attention to the reference to obligations *erga omnes* in the judgment of the International Court of Justice in the *Barcelona Traction* case, or to the means specified in the Charter of the United Nations for the maintenance of international peace and security, including measures taken by the Security Council under Chapter VII.

It would be a retrograde step – conceptually, at least – if the International Law Commission were now to reverse the decision it took over 20 years ago to include the concepts of "delicts" and "crimes" in the articles in order to distinguish between two separate categories of wrongful acts; such a step, which would not be in keeping with the unquestionably vigorous trends and developments in related fields of international law (for example, the emergence in positive law of the concept of *jus cogens* and, of course, the new and powerful momentum of the institutionalization internationally of the application of the concept of individual criminal responsibility with respect to some of the most serious international crimes), might well paralyse and freeze the law of State responsibility as a result of an excessively conservative, static approach. That notwithstanding, when the distinction between the two categories of internationally wrongful acts – delicts and crimes – is discussed, the issue of the use of the current terms ("delicts" and "crimes") must be separated from the substantive issue: whether there are two categories of wrongful acts, which – regardless of the terms used to designate them – fall under two qualitatively different regimes.

The inflexibility of the arguments put forward by those for and against distinguishing between two separate categories of wrongful acts by means of the terms in question is likely

to stand in the way of any progress on the draft as a whole. The term "crime" is criticized because it evokes an "atmosphere", a criminal law context – even though, according to the Commission, use of the term "crime" is without prejudice to the characteristics of responsibility for international crimes. An exchange of views on possible connotations serves no purposes when we have before us the actual draft articles spelling out the consequences of what the International Law Commission refers to as "international crimes". There is nothing to indicate that the articles proposed by the Commission are based on criminal law concepts; on the contrary, the articles can be interpreted as fully supporting the view endorsed by the Czech Republic: that the law of international responsibility is neither civil nor criminal, and that it is purely and simply international and therefore "specific".

The terms currently used in the text, however, raise the issue of how appropriate they are. Debating terminological issues diverts attention from substantive issues and takes up a great deal of time that could be put to better use. In view of the constant disagreements caused by the use of the terms "crimes" and "delicts" (in some legal systems, the latter term has an exclusively penal connotation), during its second reading the Commission should consider either adopting more neutral terms (for example, an exceptionally serious "internationally wrongful act" instead of a "crime") or avoiding any specific terms when referring to two different types of wrongful acts and making the distinction by other means – for example, by more effectively breaking up the text into different sections dealing separately with the consequences of wrongful acts as such and wrongful acts that jeopardize the fundamental interests of the international community as a whole. The only expression used would thus be "internationally wrongful act", which would not appear to give rise to any problems, and the distinction between the two types of acts would be made by means of the titles of the relevant sections of the draft. As a result, the terms used in the articles would be neutral but would leave the necessary room for widely acceptable terms to be developed subsequently in the sphere of State practice and doctrine.

Denmark on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The most spectacular feature of part one is no doubt the distinction contained in article 19 between international delicts and international crimes. Over the years the Nordic countries have supported this distinction, and we still do. If, for instance, one looks at the crime of genocide or the crime of aggression, such crimes are, of course, perpetrated by individual human beings, but at the same time they may be imputable to the State insofar as they will normally be carried out by State organs implying a sort of "system criminality". The responsibility in such situations cannot in our view be limited to the individual human being acting on behalf of the State. The conduct of an individual may give rise to responsibility of the State he or she represents. In such cases the State itself as a legal entity must be brought to bear responsibility in one forum or another, be it through punitive damages or measures affecting the dignity of the State. This point of view is supported by the wording of article 4 of the draft Code of Crimes against the Peace and Security of Mankind adopted by the ILC in 1996. That article provides – and correctly so we believe – that prosecution of an individual for a crime against the peace and security of mankind is without prejudice to any question of the responsibility of States. A similar provision is being considered in the context of individual criminal responsibility in the ongoing discussions of the Preparatory Committee on the establishment of an international criminal court.

If the term "crime" used in relation to a State is, however, regarded as too sensitive, consideration may be given to using other terminology such as "violations" and "serious violations" (of an international obligation). It must be essential, though, to establish particularly grave violations of international law by a State, such as aggression and genocide, as a specific category, where the consequences of the violations are more severe. It is the view of the Nordic countries that such a division into categories should be distinct and clear.

France

France proposes that this article be deleted.

Moreover, the set of draft articles – particularly article 19, a subject which France deals with in greater detail below – gives the unquestionably false impression that the aim is to "criminalize" public international law. For the Commission, the punitive function appears to characterize international responsibility. However, such a function has hitherto been unknown in the law of international responsibility, which has emphasized making reparation and providing compensation. France does not believe that an internationally wrongful act should expose the wrongdoing State to punitive legal consequences.

France has on a number of occasions stressed in the Sixth Committee of the General Assembly of the United Nations that State responsibility is neither criminal nor civil, and that it is simply *sui generis*. Mechanically transposing concepts in the sphere of internal law, particularly criminal law, would be no more than an artificial, theoretical and ineffective exercise that would lead down the wrong track.

...

France has repeatedly criticized the concept of an "international crime" as defined in draft article 19, as well as the distinction between international crimes and international delicts. Although it can hardly be denied that some wrongful acts are more serious than others, the dichotomy established by the Commission between "crimes" and "delicts" proves to be vague and ineffective. Moreover, the Commission draws very few consequences from the distinction that it makes. Furthermore, as rightly stressed by Mr. Reuter and Mr. Weil, such a distinction breaks with the tradition of the uniformity of the law of international responsibility.

...

Article 19 breaks new ground in creating a category of crimes which are specifically attributable to States and this poses a major problem linked to the responsibility of juridical persons. The new French Criminal Code does, admittedly, establish the criminal responsibility of juridical persons but it excludes the State. Indeed, the latter, which is the only entity entitled to impose punishment, could not punish itself. It is hard to see who, in a society of over 180 sovereign States, each entitled to impose punishment, could impose a criminal penalty on holders of sovereignty.

Chapter VII of the Charter of the United Nations does, admittedly, confer coercive powers on the Security Council in the matter of the maintenance or the restoration of peace, but there is no question in that chapter of a penal, or even a judicial, function with regard to States. The Security Council has already, rightly, considered that intolerable violations of the rights of a people by its own Government could constitute threats to international peace and security, and has decided to take action accordingly. Those responsible for internationally wrongful acts of exceptional gravity such as some of those envisaged in article 19 therefore risk being exposed to a prompt and appropriate reaction. It might be added that, for the purposes of maintaining peace, the Security Council has established a broad range of measures the purpose of which is simple – to prevent, dissuade and constrain – but these measures are not of a penal nature and, although they are described

as "sanctions", their purpose is not in essence punitive. They are coercive measures which are a matter for the international police.

Another problem relates to the confusion in article 19 between the two concepts covered by the term "State". In its first sense, the State covers all organs which carry out functions of state authorities, whether of a government, of public offices or even, in certain cases, of a political party, the members or leaders of which may see their criminal responsibility implicated. In its second sense, the State constitutes a more abstract legal entity, characterized by a territory, a population and institutions, an entity which is not, in essence, either good or bad, just or unjust, innocent or culpable. This confusion between the two senses distorts the whole exercise, as, moreover, several members of the International Law Commission have pointed out. There is a great danger that, if an attempt is made to impose sanctions on a State, its population will be punished.

...

The term "crime" echoes the penal vocabulary. There is, however, some danger in postulating that there is a category of internationally wrongful acts which would be exactly comparable to crimes and delicts established by national criminal laws. Article 19 thus appears to be based on the idea that all wrongful acts under international law attributable to a State, which the draft articles categorize respectively as crimes and delicts, would fall under an international criminal law applicable to States. This disregards the fact that an offence – even a serious offence – is not necessarily a crime. Under all bodies of internal law, there are failures to meet an obligation which constitute civil offences but which do not fall under the specific branch of law which is criminal law.

Article 19 must necessarily be read in the light of article 52, concerning the "specific consequences of an international crime". It will be noted, in reading the latter article, that the Commission draws almost no consequence from the concept of "crime". The differences between the consequences deriving from an international crime and those resulting from another internationally wrongful act are insignificant. This underlines the artificial character of the dichotomy. The importance of a distinction between international crimes and delicts can indeed be justified only if it is reflected in regimes of responsibility which are themselves differentiated.

Germany

See part II, chapter IV.

Ireland

The Commission draws a distinction between international crimes and international delicts in draft article 19. An international delict is defined by reference to an international crime as any internationally wrongful act of a State which is not an international crime (para. 4); and an international crime is defined as an "internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole" (para. 2). The Commission has moreover given, in paragraph 3, an illustrative list of international obligations, a serious breach of which may result in an international crime.

In its commentary to article 19, the Commission states that, since the Second World War, there has been a growing tendency to distinguish between two different categories of internationally wrongful acts of the State: a limited category comprising particularly serious

wrongs, generally called international "crimes", and a much broader category covering the whole range of less serious wrongs.[25] The Commission seems to regard the categorization of certain internationally wrongful acts as international crimes as increasingly gaining acceptance by States and to have thus acquired, or to be well advanced on the road to acquiring, the status of *lex lata*; that is, in terms of the Commission's own definition of an international crime, certain conduct on the part of a State is recognized as a crime by the international community as a whole. In the Commission's view, contemporary international law requires the application of different regimes of international responsibility to the two different categories of internationally wrongful acts.[26]

As evidence of the existence of a dual classification, the Commission cites a number of decisions of international judicial and arbitral bodies, State practice and the writings of several international jurists.

It is our opinion that if such a classification exists, it must be grounded in State practice, and decisions of international judicial and arbitral bodies and the writings of international jurists may provide evidence of State practice. However, it appears to us that the evidence cited by the Commission falls short of establishing the widespread acceptance by States of a dual categorization of internationally wrongful acts into international crimes and international delicts and is particularly flawed in two respects.

First, while much of the evidence does indeed relate to wrongful acts for which criminal responsibility exists under international law, this responsibility attaches to individuals, not to States. It is one thing for States to undertake to criminalize in their domestic law certain conduct on the part of individuals and to bring persons unsuspected of such conduct to justice. It is quite another thing for States to accept criminal responsibility themselves for such conduct. Even when the conduct of the individual may be attributed to the State, it does not necessarily follow that the responsibility of the State for the conduct is itself criminal in character.

From the evidence cited by the Commission, we would mention as examples of the elision of individual responsibility and State responsibility, without being exhaustive, that relating to genocide, apartheid and the initiation of a war of aggression.

It is true that, under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which is now widely subscribed to, the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. The acts which they undertake to prevent and punish are however those of individual human beings, whether they are constitutionally responsible rulers, public officials or private individuals, not those of a State. While States bear international responsibility for a breach of this obligation, there is no question of the responsibility being criminal in character.

Similarly, States parties to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, a Convention also widely subscribed to, declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination are crimes violating the principles of international law. Under the Convention, international criminal responsibility for such conduct attaches not to States, but to individuals, members of organizations and institutions and representatives of the State. States parties undertake to suppress and punish the conduct; but, again, while a breach of

[25] *Yearbook ... 1976*, vol. II (Part Two), chap. III B.2, para. (6) of the commentary to article 19.

[26] Ibid.

the undertaking entails the responsibility of a State, this responsibility is not criminal in character.

Likewise, States have on many occasions attributed criminal responsibility under international law to individuals and organizations for the planning, preparation and initiation of a war of aggression, most notably in establishing the international war crimes tribunals at Nürnberg and Tokyo at the end of the Second World War. While acts of aggression by a State are also prohibited under international law, there is no clear evidence that the State responsibility flowing from a prohibited act of aggression has been recognized by the international community as pertaining to a particular category designated as criminal on the part of the State. To infer from texts, such as article 5, paragraph 2, of the Definition of Aggression contained in General Assembly resolution 3314 (XXIX) of 14 December 1974, that States have accepted that an act of aggression on their part is criminal and gives rise to a regime of legal consequences distinct from those arising from acts not designated as criminal involves a quantum leap not justified by the text. Article 5, paragraph 2, states that a war of aggression is a crime against international peace and that aggression gives rise to international responsibility; it was adopted with an eye to the role of the United Nations, especially the Security Council, in the maintenance of international peace and security. Individuals bear responsibility under international law for crimes against peace, and nowhere in the Definition of Aggression is it said that a State bears criminal responsibility for an act of aggression. Rather it is the United Nations Security Council which determines the existence of an act of aggression and which may decide what measures shall be taken in accordance with the Charter of the United Nations to maintain or restore international peace and security.

Secondly, the reliance on evidence of *erga omnes* obligations to support the existence of a category of international criminal responsibility of States is misplaced. In particular, the Commission has relied on a famous passage from the judgment of the International Court of Justice in the *Barcelona Traction* case of 5 February 1970 in which the Court drew "an essential distinction" between the obligations of a State towards the international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. As examples of the former obligations the Court cited those deriving from the outlawing of acts of aggression and of genocide and from the principles and rules of international law concerning the basic rights of the human person, including protection from slavery and racial discrimination. In the Court's view, all States have a legal interest in the observance of such obligations. It follows that the responsibility engaged by the breach of these obligations is engaged not only in regard to the State that was the direct victim of the breach; it is also engaged in regard to all the other members of the international community, so that, in the event of a breach of these obligations, every State must be considered justified in invoking the responsibility of the State committing the internationally wrongful act. It should be noted that nowhere in its judgment does the Court draw a link between a breach of an *erga omnes* obligation and the attribution of criminal responsibility to a State. To do so involves another quantum leap not justified by the text of the judgment.

Instead the passage affords evidence of a distinction between international obligations according to whether the obligation is owed to the international community of States as a whole or to one or more other particular States. This is a distinction which goes to the scope of the obligation, not to its nature. The legal consequences of a breach of an *erga omnes* obligation may be different from those of a breach of an obligation owed to one or more particular States in that, in the former case, all States may be entitled to invoke the international responsibility of the wrongdoing State whereas, in the latter case, only the particular injured State or States may be so entitled. Such a difference in legal consequences does not however provide a sufficient basis for categorizing some internationally wrongful

acts as international crimes and others as international delicts since the attribution of criminal responsibility is generally understood to relate to the nature and seriousness of the wrongful act, not merely to the scope of the obligation which has been breached.

We appreciate that the role of the International Law Commission encompasses not only the codification of international law but also its progressive development. We have therefore thought it appropriate also to consider whether the development of a dual classification of internationally wrongful acts into international crimes and international delicts is desirable *de lege ferenda* as opposed to *lex lata*. Having considered the matter, we are of the view that it would not be desirable at the current stage for a number of reasons.

First, the concept of criminal responsibility is well developed in national legal systems, where it is generally associated with specific characteristics which distinguish it from that of civil responsibility. Not only is a crime usually understood as a wrong against society at large and as entailing a breach of the fundamental values of society, it carries penal connotations and the criminal law is typically enforced by institutions of State including organs of detection, investigation, compulsory adjudication and punishment. In contrast, international society does not possess comparable organs and the application of "penal" sanctions to a State is of an entirely different order than the application of such sanctions to an individual.

In rejecting the concept of an international crime to describe grave breaches of international law by States, it is not that we do not recognize that there is a qualitative difference between, for example, genocide and the failure of an embassy to pay service charges for which it is liable. Rather it is that the concept of a crime has been developed in national systems of law and now carries many connotations which cannot be transposed easily into the still essentially decentralized system of international law.

Secondly, even if it is accepted that penal sanctions may be applied to a State, to do so may in some instances be inherently unjust. In reality, it will be a Government, acting in the name of a State, which commits an internationally wrongful act. In the case of an undemocratic regime, the application of a sanction against a State may have an adverse impact upon the population of the State, not merely on the Government, and in so doing, may "penalize" persons who cannot in any moral sense be said to bear responsibility for the wrongful act. Indeed, to take the example of a grave breach of international law which we mentioned earlier, that of genocide, this will often be committed by a Government, or condoned by a Government, against a section or sections of the population of the State of which it is the Government.

Thirdly, the international community is currently engaged in negotiations for the establishment of an international criminal court before which individuals may be tried for some of the most serious offences. What these offences should be has been the subject of considerable controversy among States, showing that even on matters in respect of which the international criminal responsibility of individuals is widely accepted, there can be substantial disagreement on the content and scope of this responsibility. There is no such widespread acceptance of the international criminal responsibility of States, and even greater difficulties can be expected in the search for an agreed definition of specific offences. Moreover, given the current focus of the international community on the international criminal responsibility of individuals, which has come only after very many years of deliberation on the subject, consideration of the attribution of criminal responsibility to States runs the risk of diluting this focus and, at worst, undermining the momentum for the establishment of an international criminal court.

In our view, criminal liability is essentially about individual moral responsibility; and the best way forward in international law is to try to get universal agreement that particularly heinous behaviour on the part of individuals should be criminalized and to establish the necessary procedures and institutions at the international level to ensure that human beings are called to account for such behaviour. It seems to us that this is what the current proposals for the establishment of an international criminal court are all about, and that this is the best way of proceeding in the matter. As was said by the Nürnberg Tribunal, crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Fourthly, proposals for the progressive development of international law are unlikely to be successful if they are far removed from State practice. At the very least they need a basis in State practice and the general support of States. The Commission claims to have identified a trend in State practice since the Second World War towards the increasing acceptance by States of the notion of international crimes for which States bear responsibility under international law. However, we have already expressed the opinion that the evidence cited by the Commission of this trend is not convincing. Moreover, it is clear that, currently, several powerful States, including members of the Security Council of the United Nations, are opposed to the concept of the international criminal responsibility of States. It is therefore our view that any prospect of the progressive development of international law on this topic in the direction advocated by the Commission is slim.

Although we reject the distinction drawn in draft article 19 between international crimes and international delicts, we nonetheless consider that there is some merit in regarding international obligations *erga omnes* as a distinct category and the responsibility of States for a breach of these obligations as of a different order than the breach of an obligation owed to a particular State or States. We therefore urge the Commission to give further consideration to State responsibility for a breach of an *erga omnes* obligation, especially to the legal consequences in respect of a State not directly affected by the breach as opposed to a State directly affected thereby.

Mexico

There is inadequate differentiation of the terms "crime" and "delict" in the draft articles.

Mongolia

Mongolia is fully aware of the practical and theoretical questions that are raised in connection with the notion of State crime and the distinction of international wrongdoing between crimes and delicts. It nevertheless stands for the retention in the draft articles of both the concept of international crimes and the distinction of international wrongdoing between crimes and delicts. It is obvious that international law cannot treat all cases of its breaches on an equal footing for the simple reason that some of these breaches may create much more serious consequences than others. The most important and appropriate requirement is that the determination of the commission of an international crime not be left to the decision of one State, but be attributed to the competence of international judicial bodies.

Switzerland

My delegation's second comment bears on the distinction made by the International Law Commission between delicts and "crimes". Criminalizing certain types of State conduct in pursuance of the peremptory norms of the law of nations is the corollary of the idea that certain violations of international law are more serious than others and merit a harsher punishment. This is certainly true, but one is inclined to think that this distinction, over which much ink has been spilt, might for several reasons create more problems than it would solve.

First of all, the distinction is meaningless unless the consequences entailed by the two categories of violations are substantially different. Article 52 of the draft governs the consequences of international "crimes" committed by States. It prescribes that the limitations imposed by article 43, subparagraphs (c) and (d), on the right to obtain restitution in kind – which, it must be added, is impossible in a number of cases – do not apply to these "crimes". In other words, the injured State could demand *restitutio in integrum* even if this imposed a disproportionate burden on the State which had committed a wrongful act (article 43, para. (c)), or threatened the political independence or economic stability of that State (para. (d)). These distinctions are either inadequate or dangerous; they are dangerous because, in the opinion of my delegation, the abeyance of article 43, subparagraph (d), in the context of "crimes", as prescribed by article 52, subparagraph (a), raises the possibility of inflicting serious punishment on an entire people for the wrongdoing of its Government, thereby compromising international security and stability.

Another element of the distinction between delicts and "crimes" emerges from article 40, paragraph 3, of the draft. If a "crime" is committed, all States other than the perpetrating State could claim to be "injured States" and are bound to attach to the crime the consequences set out in article 53 of the draft. However, to the extent that the concept of "crime" overlaps with a violation of the peremptory norms of international law, all States could consider themselves injured within the meaning of draft article 40, paragraph 3, even without determining whether the conduct contrary to *jus cogens* is or is not considered a "crime". In order to attach especially severe consequences to certain types of conduct, it is therefore not necessary to include article 40, paragraph 3, of the draft or to criminalize the types of conduct arising therefrom.

Another difficulty stems from the absence of a judicial mechanism that could be invoked unilaterally. Conduct that violates international law would therefore be characterized largely by the States concerned. The conflict over the existence of the violation itself would therefore be compounded by a further disagreement over its characterization, which would hardly contribute to fleshing out the distinction between delicts and "crimes".

Finally, it is legitimate to ask whether the trend towards criminalization at the international level (it seems the Commission intends to add the international "crimes" of States to those of individuals) is appropriate from the standpoint of legal policy. My delegation believes that the exercise is an attempt by the international community to conceal the ineffectiveness of the conventional rules on State responsibility behind an ideological mask.

For all these reasons, my delegation is not in favour of the distinction between delicts and crimes. It hopes that the International Law Commission will carefully consider the merit of such a step during the second reading of the draft.

...

The first comment refers to article 19, if it is retained. One wonders whether it might be useful to establish a connection here between the "crimes" of States and crimes committed by individuals, as defined in articles 16 to 20 of the draft Code of Crimes against the Peace and Security of Mankind. Article 19 of the current draft does not in fact specifically mention war crimes, crimes against humanity and crimes against United Nations and associated personnel. It may well be that these categories of crimes entail State responsibility in addition to the criminal responsibility of the individual perpetrators. It would be paradoxical if the criminal responsibility of these individuals came into play without the concomitant responsibility of the State.

United Kingdom

The United Kingdom remains firmly persuaded that it would be damaging and undesirable to attempt to distinguish in the draft articles between international delicts in general and so-called "international crimes". This view has been expounded over many years in the debates in the Sixth Committee on the annual reports of the Commission. The United Kingdom has seen nothing to cause it to deviate from the views then expressed; quite the contrary. In essence, therefore, the position of the United Kingdom remains that the provisions concerning international crimes should be omitted from the draft articles. While reaffirming that position, the United Kingdom wishes merely to add the following:

There is no basis in customary international law for the concept of international crimes. Nor is there a clear need for it. Indeed, it is entirely possible that the concept would impede, rather than facilitate, the condemnation of egregious breaches of the law. The proposed draft articles are likely to make it more difficult for the international community to frame the terms of the condemnation so as to match precisely the particular circumstances of each case of wrongdoing. By establishing the category of international crimes, the danger of polarizing moral and political judgements into a crude choice between crimes and delicts is increased. There is a real possibility of dissipating international concern with the causes and consequences of wrongful acts by focusing debates on the question whether or not those acts should be classified as international crimes, rather than on the substance of the wrong. There is also a serious risk that the category will become devalued, as cases of greater and lesser wrongs are put together in the same category, or as some wrongs are criminalized while others of equal gravity are not.

...

Given the controversial nature of the concept, and the possibility that its adoption might lead to adverse consequences, the United Kingdom is opposed to the creation of a separate category on international crimes. Further, more detailed criticisms of the Commission's proposal are made below.

United States

Since the introduction of the distinction in draft article 19 between "international crimes" and "international delicts" in 1976, many States, members of the Commission, and prominent lawyers and scholars have voiced serious objections. On prior occasions, the United States identified to the Commission the serious difficulties inherent in the attempt

to insert a regime of criminal responsibility into the law of State responsibility.[27] Still, the basic distinction pervades the draft, undermining the focus of the law of State responsibility.[28] The concept of international crimes of States bears no support under the customary international law of State responsibility, would not be a progressive development and would be unworkable in practice.

State responsibility, as Professor Brownlie has pointed out, is "a form of *civil* responsibility".[29] Where a State imposes injuries on another, it bears responsibility to make reparation, the "essential principle" of which is that it must, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed".[30]

The notion that a State might additionally be subject to criminal responsibility for some delicts but not for others is foreign to the law of State responsibility. Indeed, the Commentaries adduce no international precedent to support the concept. Whether such breaches are called "crimes" or "exceptionally serious wrongful act[s]", they belong outside the framework of State responsibility. The United States continues to oppose the inclusion of a concept of State crimes in the draft articles and would highlight the following difficulties:

Institutional redundancy

Existing international institutions and regimes already contain a system of law for responding to violations of international obligations which the Commission might term "crimes". Indeed, serious violations of humanitarian law, for instance, should be addressed through a coherent body of law applied by appropriate institutions. The Security Council has taken important steps in this direction through the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.[31] Intensive international efforts are now under way to establish a permanent international criminal court. Avenues such as these clarify and strengthen the rule of law. By contrast, the enunciation of a category of "State crimes" would not strengthen the rule of law but could add unnecessary confusion.

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[27] See, e.g., *Report of the International Law Commission on the Work of its Thirtieth Session*, Sixth Committee, 40th meeting, agenda item 114, p. 2, document A/C.6/33/SR.40 (1978).

[28] Article 19, paragraph 3, enumerates four categories of crimes, under the general headings of peace and security, self-determination, "safeguarding the human being" and "preservation of the human environment". Draft article 40, paragraph 3, defines "injured State" to include all States in the context of a State crime. Draft articles 51, 52 and 53 treat the consequences of crimes, including modifications of the law of reparation and obligations on States in response to an international crime.

[29] Brownlie, (op. cit., footnote 24), p. 23. See also B. M. Whiteman, *Digest of International Law* (1967), p. 1215.

[30] *Chorzow Factory Case (Poland v. Germany) P.C.I.J., Ser. A*, No. 17, p. 47.

[31] Moreover, the Security Council has acted in areas defined as "crimes" by the draft articles. For instance, the act of aggression (draft article 19 (3) (a)) by Iraq against Kuwait was countered by the Security Council's series of resolutions in 1990 and 1991 under Chapter VII, e.g., Security Council resolutions 660 (1990) of 2 August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991 and 687 (1991) of 3 April 1991. The Council took a number of steps relative to genocide (draft article 19 (3) (c)) with respect to the former Yugoslavia and Rwanda, e.g., resolutions 770 (1992) of 13 August 1992, 808 (1993) of 22 February 1993, 827 (1993) of 25 Mary 1993 (former Yugoslavia); and resolutions 918 (1994) of 17 May 1994 and 955 (1994) of 8 November 1994 (Rwanda). Further, as notions of international security increasingly assimilate the idea of environmental protection against severe degradation, the Council may act against aggressive State actions bringing about "massive pollution", much as it did against Iraq's wanton destruction of Kuwaiti oil fields in 1991; see Council resolution 687 (1991), para. 16, reaffirming Iraq's responsibility for "damage – including environmental damage and the depletion of natural resources".

...

As a practical matter, the establishment of a separate category of State crimes in the draft articles risks diminishing the import of and the attention paid to other violations of State responsibility (i.e., "delicts"). An injured State may well argue that the particular act at issue amounts to a "crime" simply to increase its claim for reparation for the delict.

The principle of individual responsibility

"Crimes against international law", the Nürnberg Tribunal stated, "are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[32] The Commission early on echoed Nürnberg, saying that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".[33] The principle of individual responsibility also has been embodied in international conventions on the prevention of genocide, apartheid and slavery, three of the subjects that the draft includes under the category of "safeguarding the human being". The principle has been codified in numerous international instruments and put into practice in such landmark institutions as the International War Crimes Tribunals following the Second World War and the International Criminal Tribunals for the Former Yugoslavia and Rwanda today.

To be sure, the existence of a category of crimes against humanity for which individuals are responsible attests to the "exceptional importance now attached by the international community to the fulfilment of obligations having a certain subject matter".[34] Yet it is one thing to recognize the responsibility of individuals and quite another to establish a criminal regime punishing States for such violations. In practice, two regimes of responsibility – one for individuals and one for States – could help insulate the individual criminal from international sanction. Although some observers have found that State and individual criminal responsibility may coexist, an individual criminal may be emboldened to attempt to shift a degree of responsibility away from himself and to the State by resort to a provision for State crimes. To that extent, respect for the principles of war crimes tribunals at Nürnberg and the International Criminal Tribunals for the Former Yugoslavia and Rwanda will be undermined.

In sum, the draft articles concerned with international "State crimes" are unacceptable and risk undermining the entire project of codification of the law of State responsibility.

Paragraph 2

Czech Republic

Under paragraph 2 (the wording of which appears to be tautological or "circular" but is not because the objective criterion used actually refers to a subjective element, namely, recognition, which must be verifiable), a breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the international community as a whole constitutes an international crime. Although this characterization offers the advantage of not prejudging

[32] *Trial of the Major War Criminals Before the International Military Tribunal at Nürnberg*, vol. 22 (1948), p. 466.

[33] *Yearbook ... 1950*, vol. Two, document A/1316, part III, PRINCIPLE I, p. 374.

[34] Commentaries, p. 114.

the future development of the category of crimes, it does leave some doubt as to how it is to be determined which specific wrongful acts really constitute crimes.

France

Paragraph 2 states that "an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime." This wording is imprecise. Who will establish the "essential nature" of the obligation in question? What is meant by the "international community"? One can visualize the political reality that such a term is meant to represent. However, reference is being made to an entity that is legally indeterminate. Furthermore, who will determine that an interest is "fundamental" and that it is of concern to the "international community", an entity which both article 19 and texts dealing with positive law fail to define legally? Is reference being made to the interests of all States or only to the interests of a large number of States, and in the latter case, which States? These are instances of legal imprecision that are most regrettable in a draft of this type.

One can only wonder at the lack of concordance between paragraphs 2 and 3 of the article: why is the word "serious", which is to be found in paragraph 3, not used to describe the violation of an "essential" obligation, mentioned in paragraph 2, when it appears in each subparagraph of paragraph 3?

...

Article 19 draws on the same idea as *jus cogens*. If paragraph 2 is read in the light of articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, it will be noted that the concept of "an international obligation so essential for the protection of fundamental interests of the international community" is very close to that of "a peremptory norm of general international law". It is precisely because the 1969 Vienna Convention introduced a concept of the law of treaties which was previously unknown and, what is more, is dangerous for legal security, that France refused to sign that Convention. [For the reasons of principle stated above, the express references to *jus cogens* in article 18, paragraph 2, article 29, paragraph 2, and article 50, subparagraph (e), should be deleted.]

In any event, the scope of the concept of "crime" should not be confused with that of *jus cogens*; the introduction into the draft articles of two concepts which are of similar inspiration but divergent in scope adds further obscurity to the text.

United Kingdom

Draft article 19 introduces the controversial category of international crimes. It was indicated above that the United Kingdom Government does not support this provision. Without prejudice to that position, it wishes to make two more specific points concerning the approach adopted in the article.

First, the category of international crimes depends upon the identification of international obligations that are "so essential for the protection of fundamental interests of the international community" that their breach is recognized by that community as a crime. Yet there is no coherent account given of the manner in which "the international community as a whole" may "recognize" such rules. How, and by whom, is it to be determined what "the international community as a whole" is, and whether it has recognized

a particular norm as "so essential for the protection of fundamental interests" as to render its breach an international crime?

United States

Abstract and vague language

Paragraph 2 applies to "international obligation[s] so essential for the protection of fundamental interests of the international community" that they are to be considered crimes.

Uzbekistan

Article 19, paragraph 2, should read as follows:

> "Internationally wrongful acts of exceptional gravity which pose a threat to international peace and security and also infringe upon other vital foundations of peace and of the free development of States and peoples constitute international crimes."

Paragraph 3

Czech Republic

The Commission cannot be expected to draw up a list of international crimes.

France

A draft on responsibility should lay down only secondary rules. However, paragraph 3 lays down primary rules by classifying international obligations in a basic fashion. France has indicated on a number of occasions that substantive rules do not belong in a text concerning secondary rules. Moreover, the list set out in paragraph 3 – whose illustrative nature is surprising in a draft of this kind – is largely obsolete and heterogeneous. It contains government policies rightly criticized today by the vast majority of States, which are the result of political approaches that reflect the ideological concepts of a bygone era rather than acts that are clearly identifiable and punishable by a criminal jurisdiction of any kind. Reference is also made to such phenomena as transboundary air and water pollution, which have as yet not been criminalized under all domestic legal systems and which the Commission itself is still discussing with a view to establishing into which category of responsibility they fall. This paragraph, which reveals the subjectivity of article 19, therefore does not belong in a codification text.

Criminal justice, as it exists in domestic law, presupposes a moral and social conscience, but it also presupposes a legislator empowered to define and punish offences, a judicial system to decide on the existence of an offence and the guilt of the accused, and a police force to carry out the penalties handed down by a court. Yet no legislator, judge or police exists at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them.

The two International Criminal Tribunals for the former Yugoslavia and for Rwanda and the future international criminal court are, admittedly, indicative of the intention to be able to try individuals who have incurred responsibility for serious violations of international

humanitarian law or other particularly heinous crimes, such as genocide, but the machinery set up (or to be set up) for that purpose does not permit the attribution of criminal responsibility to States, and is in fact not designed to do so. These initiatives, which emphasize the criminal responsibility of individuals, take away the rationale for prosecuting and punishing a State.

...

One can only wonder at the lack of concordance between paragraphs 2 and 3: why is the word "serious", which is to be found in paragraph 3, not used to describe the violation of an "essential" obligation, mentioned in paragraph 2, when it appears in each subparagraph of paragraph 3?

United Kingdom

There is a tension between paragraphs 2 and 3. Paragraph 2 defines a crime as "the breach by a State" of what might be called an "essential obligation". Paragraph 3 states that crimes may result from a "serious breach" of certain obligations. It should at least be made clear whether it is the importance of the rule, or the seriousness of the conduct violating the rule, which is decisive. It seems probable that the International Law Commission intended the approach represented by paragraph 3 to be followed, since the Commentary emphasizes that a breach of a rule of *jus cogens* does not necessarily constitute an international crime. If that be so, and the essential question is not the nature of the rule but rather the seriousness of the conduct constituting the violation, it may be asked again whether there is a need for a distinct category of "international crimes".

United States

Abstract and vague language

As noted, specific regimes of international law already govern particular violations referred to in paragraph 3, so it is not clear how their enumeration in the draft articles adds anything to the law. These topics are enumerated with references that cloud rather than clarify meaning. To what specific rules, for instance, do the phrases "massive pollution of the atmosphere or the seas" or "safeguarding the human being" refer? Highly subjective terms are used to qualify the topics; specific categories of crimes are encumbered with subjective qualifications ("of essential importance", "serious", "on a widespread scale", "massive") susceptible to any number of interpretations. As a result, a decision-making body would lack objective rules that could be applied coherently in specific cases.

Paragraph 4

France

With regard to the concept of "delict", it will be noted that there is quite simply no definition. The formula in the paragraph whereby anything which is not a crime is necessarily a delict is hardly satisfactory. To make a distinction (between crimes and delicts) does not amount to giving a precise definition of what really constitutes a "delict".

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries are doubtful as to the somewhat subtle academic distinction between obligations of "conduct" as opposed to obligations of "result" ... insofar as these distinctions, in contrast to that of "delicts" and "crimes", do not appear to have any bearing on the consequences of their breach as developed in part two of the draft.

France

Our criticism of article 19, paragraph 3, also applies to the somewhat obscurely worded article 20 ...: it relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind and should be deleted.

Germany

The very elaborate draft provisions on the breach of an international obligation requiring the adoption of a particular course of conduct (article 20), on the breach of an international obligation requiring the achievement of a specified result (article 21) and on the breach of an international obligation to prevent a given event (article 23) are intended to establish a complete set of rules devoid of any loopholes. Of course, every endeavour to avoid legal uncertainties wherever possible should be supported. However, there is a certain danger in establishing provisions that are too abstract in nature, since it is difficult to anticipate their scope and application. Such provisions, rather than establishing greater legal certainty, might be abused as escape clauses detrimental to customary international law. They may also seem impractical to States less rooted in the continental European legal tradition, because such abstract rules do not easily lend themselves to the pragmatic approach normally prevailing in international law.

Furthermore, it is doubtful whether an obligation under article 23 can always be separated from an obligation under article 20. For instance, article 22 of the Vienna Convention on Diplomatic Relations requires the receiving State to take all measures to ensure that the premises of a mission are not subject to any intrusion or damage and that there is no disturbance of the peace of the mission or impairment of its dignity. It appears doubtful whether this gives rise to a mere obligation to prevent the occurrence of an event, as seems to be the view of the Commission,[34a] or whether it also implies a duty on the part of the State to adopt a particular course of conduct in order to ward off danger from a mission (e.g., to provide police protection). The draft articles are also silent on the question as to whether an obligation under article 20 may conflict with an obligation under article 23. In sum, the German Government is not quite sure whether the complicated differentiations set out in articles 20, 21 and 23 are really necessary, or even desirable.

[34a] *Yearbook ... 1978*, vol. II (Part Two), chap. III.B.2, paras. (4)-(15) of the commentary to article 23.

Switzerland

See "General remarks", above.

Article 21. Breach of an international obligation requiring the achievement of a specified result

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries are doubtful as to the somewhat subtle academic distinction between obligations of "conduct" as opposed to obligations of "result" ... insofar as these distinctions, in contrast to that of "delicts" and "crimes", do not appear to have any bearing on the consequences of their breach as developed in part two of the draft.

France

Our criticism of article 19, paragraph 3, also applies to the somewhat obscurely worded article 21 ...: it relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind and should be deleted.

Germany

See article 20.

Switzerland

See "General remarks", above.

United Kingdom

See article 16.

Paragraph 2

United Kingdom

The United Kingdom Government regards the propositions set out in draft article 21, paragraphs 1 and 2, as uncontroversial, but is concerned by the interpretation given to the proposition in paragraph 2 in the International Law Commission Commentary. The Commentary[35] suggests that where a State offers compensation to an injured foreigner having failed to exercise the vigilance required by international law to prevent an attack

[35] Commentaries, pp. 143 and 150.

upon him, the payment or offering of compensation is the achievement of an "equivalent result" to the fulfilment of the initial obligation of vigilance. In the view of the United Kingdom this is not correct. No State has a free choice as to whether it safeguards foreigners and their property or pays them compensation. It is desirable that this be made clear in the Commentary.

It is also suggested in the Commentary,[36] paragraph 2 might apply where the initial conduct of the State constituting the violation of the obligation can be repaired by some further action by the State. The Government of the United Kingdom notes once again its concern that the International Law Commission proceed on the basis of a correct interpretation of the exhaustion of local remedies principle, from which the situation contemplated by the draft paragraph should be clearly distinguished.

In general terms, the United Kingdom Government's view is that in a case where international law requires only that a certain result be achieved, the situation falls under draft article 21, paragraph 2. The duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court. In the case of such obligations, no breach occurs until the State has failed to take any of the opportunities available to it to produce the required result. If, on the other hand, international law requires that a certain course of conduct be followed, or that a certain result be achieved within a certain period of time, the violation of international law arises at the point where the State's conduct diverges from that required, or at the time when the period expires without the result having been achieved. Denial of a right of innocent passage, or a failure to provide compensation within a reasonable period of time after the expropriation of alien property, are instances of violations of such rules. Recourse to procedures in the State in order to seek "correction" of the failure to fulfil the duty would in such cases be instances of the exhaustion of local remedies.

Article 22. Exhaustion of local remedies

France

It would be useful to specify that the exhaustion of local remedies is limited to diplomatic protection.

Germany

The Commission might also want to reconsider this article. It would appear that it has been placed into the draft in a somewhat haphazard manner, as it bears no relation either to article 21 or to article 23. While the rule on the exhaustion of local remedies certainly is a well accepted one, it has been developed for and applied in particular situations, above all the taking of the property of aliens.[37] It should be made clear that the rule does not apply in cases of grave violations of the law on the treatment to be accorded to aliens that constitute, at the same time, violations of these human rights. It might be preferable not to treat the subject of local remedies at all in the current context since it does not represent an element necessary to the draft.

[36] Ibid., p. 149, para. 30.

[37] See *Mavrommatis Palestine Concessions*, *P.C.I.J.*, *Series A*, No. 2, p. 12.

United Kingdom

In the view of the Government of the United Kingdom, the draft articles are in one respect based upon an incorrect interpretation of the rules of customary international law. The Commentary on certain draft articles, notably draft article 22, indicates that the effect of the rule concerning the exhaustion of local remedies is that no international wrong arises until the moment that the local remedies have definitively failed to redress the wrong. The United Kingdom Government is not persuaded that this is correct. It hopes that the International Law Commission will give further consideration to the question whether as a matter of customary international law the exhaustion of local remedies is not merely a procedural precondition to the making of an international claim, rather than a precondition to substantive responsibility arising. This is a question of some practical importance, particularly in the context of time-limited compromissory clauses and of the determination of the quantum of compensation due for breaches of international obligations. It is desirable that the draft articles accurately reflect current customary law on this point.

...

The views of the United Kingdom Government concerning the exhaustion of local remedies principle have already been noted. Draft article 22 adopts the view that the duty to exhaust local remedies is not a "merely procedural" rule. In the United Kingdom Government's view, however, the duty to exhaust local remedies is indeed merely a procedural rule. There are rules of international law which are, in the terminology of the International Law Commission, "obligations of conduct". The rule forbidding the physical mistreatment of aliens by persons whose actions are imputable to the State is an example. In such cases, the breach plainly arises at the time that the State fails to act in conformity with the rule. Where the alien initially seeks a remedy in the local courts, the claim before the local courts is a step in the exhaustion of the local remedies. It takes place after the violation has occurred and before a claim in respect of the violation may be pursued on the international plane.

There may appear to be exceptional cases in which unsuccessful recourse to the local courts is indeed necessary in order to "complete" the violation of international law. Thus, some rules of international law permit what might at first appear to be "mistreatment" of aliens and their property, provided that the alien is compensated. The rules permitting the expropriation of alien property for a public purpose are an example. On a proper analysis of the precise nature of the obligation in these rules, however, it is clear that they do not constitute exceptions to the analysis applied above to "obligations of conduct". It is true that the breach does not arise until local procedures have definitively failed to deliver proper compensation (or, more accurately in the case of expropriation, have so failed within the time limits implied by the requirement of promptness). But this is not because the breach arises only when local remedies have been exhausted. It is because the duty is, strictly, not to refrain from expropriation for public purposes, but to compensate (by whatever procedure the State might choose) if property is expropriated – or, to put it another way, to refrain from uncompensated expropriations.

The category of rules of this second kind, where the breach arises only after a definitive position is taken by the courts or other organs of the State, is approximately the same as the International Law Commission's category of "obligations of result". The Commission has drafted article 22 so as to make it plain that it applies only to such obligations. The article states that there is a breach only if local remedies have been exhausted without redress. But this embodies, in the view of the United Kingdom Government, a fundamental conceptual confusion. The recourse to "local remedies" is in

this context not at all of the same nature as recourse to local remedies as a procedural precondition for the taking over of the individual's claim and its pursuit on the international plane by his national State. The United Kingdom Government does not accept the approach adopted by the International Law Commission in draft article 22. Indeed, it considers that draft article 21 states all that is necessary in this context in relation to obligations of result, and that draft article 22 could advantageously be omitted.

Without prejudice to the foregoing points, the United Kingdom Government wishes also to make two points concerning the drafting of draft article 22. First, the Commentary states that "'local remedies' means the remedies which are open to natural or juridical persons under the internal law of a State".[38] In practice, remedies open to an alien may not be "local" to the wrongdoing State. For instance, the State's laws might provide, by virtue of an agreement such as the Brussels Convention or the European Union Treaties, that the remedy must be sought in the courts of another State or in a tribunal within a regional or international organization. Similarly, either by virtue of the State's own laws, or by virtue of a contractual agreement (not necessarily governed by the State's own laws), the person might be bound to pursue a claim before a tribunal of the International Centre for Settlement of Investment Disputes (ICSID). Alternatively, the person may, under the law of the State, be permitted to choose to pursue a remedy in a court or tribunal of another State that has jurisdiction over the matter. It would be helpful if the International Law Commission were to consider whether these possibilities necessitate any modification to the draft article or to the views expressed in the Commentary.

Secondly, the Commentary[39] makes plain that the draft article leaves open the question whether the local remedies rule is applicable in circumstances where the injury is suffered by an alien outside the territory of the State. If the purpose of the local remedies principle is (as the Commission asserts in the Commentary[40] to enable the State to avoid responsibility for the breach of an international obligation by redressing the wrong, that logic applies regardless of the locus of the conduct and of the nature of the individual's link with the State. From the point of view of each State as potential wrongdoer, it would surely be preferable to bring all cases of wrong, whether intra- or extraterritorial, within draft article 22. From the point of view of each State as potential protector of injured citizens, such an inclusive approach would in principle create no more and no less disadvantage than the indisputable duty to exhaust local remedies in cases of wrongdoing by a State within its territory. Furthermore, the extension would be likely to arise in practice only in claims against States with a considerable extraterritorial capability to injure aliens. For those reasons, the balance of advantage might appear to lie with the inclusion of all cases within draft article 22, contrary to the position represented in the Commentary.

On the other hand, there are egregious cases where the view might be very different. For instance, if agents of State A attack a private ship or citizen of State B outside the territory of State A, and perhaps beyond the territory of any State, a duty to exhaust the local remedies of State A might appear inappropriate, even if there were effective, impartial remedies available in State A. The United Kingdom Government suggests that the Commission examine this issue further, in an attempt to discover whether these conflicting policy arguments can be reconciled.

See also article 9.

[38] Commentaries, p. 171, para. 63.

[39] Ibid., p. 165, para. 40, and p. 171, para. 61.

[40] Ibid., p. 168, para. 48.

United States

See article 29.

Article 23. Breach of an international obligation to prevent a given event

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries are doubtful as to the somewhat subtle academic distinction between obligations of "conduct" as opposed to obligations of "result" ... insofar as these distinctions, in contrast to that of "delicts" and "crimes", do not appear to have any bearing on the consequences of their breach as developed in part two of the draft.

France

Our criticism of article 19, paragraph 3, also applies to the somewhat obscurely worded article ... 23: it relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind and should be deleted.

Germany

See article 20.

United Kingdom

The Commission considers that draft article 21 (Breach of an international obligation requiring the achievement of a particular result) does not adequately cover responsibility arising from obligations requiring a State to prevent a certain event in circumstances where the occurrence of the event is caused by factors in which the State plays no part. An obligation on State A to ensure that citizens of another State are not lynched by xenophobic mobs, for example, is, in the view of the Commission, distinct from an obligation to achieve a specific result.[41] The State is not obliged to do anything. In the absence of an attack by a mob no responsibility arises, even if it is evident that the State is utterly incapable of preventing a threatened attack. Responsibility arises only if the citizens are in fact lynched.

In the view of the Government of the United Kingdom, it is questionable whether there is a real distinction here. It might be said that the State's duty is to bring about the result that aliens are not attacked by xenophobic mobs. Every duty of prevention might be reformulated in this way. That being so, it is not clear that there is any real purpose to be served by drawing a distinction between the situations covered by draft article 21 (failure to achieve a particular result) and by draft article 23 (failure to prevent a given result). Draft article 23 is uncontroversial, but appears to be unnecessary. The United Kingdom

[41] Ibid., p. 173, para. 4, and p. 174, para. 8.

Government hopes that the Commission will consider whether it is necessary to retain draft article 23 and, if it is, whether it might be combined with draft article 21.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

France

In the view of France, article 24 ... should be retained in the draft since it establishes classification of breaches on the basis of how the breach is committed. It also allows for the establishment of the dates of breaches, which is very useful in the context of a procedure for the settlement of disputes.

Germany

Articles 24 to 26 provide for another complex series of abstract rules, this time governing the "moment and duration of the breach of an international obligation". It is submitted that this scheme will tend to complicate rather than to clarify the determination of responsibility. From a practical point of view, the provisions do not assist in distinguishing between a continuing act (article 25) and an act not extending in time (article 24). The issue will always boil down to a thorough examination of the primary rule concerned and the circumstances of its violation. Even then, a determination will always be subject to debate, as has been recently demonstrated in the *Gabcikovo-Nagymaros* case.[42]

United States

See article 18.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

France

In the view of France, article 25 ... should be retained in the draft since it establishes a classification of breaches on the basis of how the breach is committed. It also allows for the establishment of the dates of breaches, which is very useful in the context of a procedure for the settlement of disputes. Nevertheless, it might be useful to link article 25 to other articles referring to the same concepts:

[42] International Court of Justice, *Case concerning the Gabcikovo-Nagymaros Project* (Hungary vs Slovakia), 25 September 1997 (see on the one hand the majority opinion of the Court at para. 108 and, on the other hand, the separate opinion of Judge Fleischhauer as to the date of the unlawfulness of the recourse by Czechoslovakia to the so-called "Variant C").

(a) A breach by a continuing act: article 25, paragraph 1, should be linked to article 18, paragraph 3;

(b) A breach by a composite act: article 25, paragraph 2, should be linked to article 18, paragraph 4;

(c) A breach by a complex act: article 25, paragraph 3, should be linked to article 18, paragraph 5.

Germany

See article 24.

United Kingdom

The United Kingdom Government is concerned that, throughout part one, chapter III, of the draft articles, the fineness of the distinctions drawn between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility.

The United Kingdom Government is also concerned that it may be difficult to determine the category into which a particular conduct falls. This is a general point, applicable to the distinctions drawn by the Commission between obligations of conduct and obligations of result, between the various kinds of breach, and so on. It is raised here in relation to draft article 25.

United States

See article 18.

Paragraph 1

United Kingdom

Paragraph 1 is concerned with breaches having "a continuing character"; but there are no criteria for identifying such breaches. For example, in the scheme of these draft articles, does an expropriation of alien property by means of a decree, or the continued detention of and dealing in that property after the date of the decree, amount to a continuing act? Or are the subsequent holding and transactions independent breaches, or perhaps not breaches of international law at all? And how far may a claimant State adjust the position by the manner in which it formulates its claim? The United Kingdom Government hopes that, if this draft article is retained, the International Law Commission will provide guidance on its interpretation. The view of the United Kingdom Government is that these questions are properly to be answered by considering the nature of the obligation rather than of the act. Indeed (to pursue the example used above), it does not think it even possible, by an examination of the act, to determine whether the continuing dispossession of the owner is a continuing wrong, or a consequence of the initial taking.

Paragraph 2

United Kingdom

Paragraph 2 is not controversial, but the United Kingdom Government suggest that the International Law Commission might consider combining the category of composite acts with that of paragraph 1.

Paragraph 3

United Kingdom

The United Kingdom Government does not support the approach to the duration of complex acts adopted in draft paragraph 3. The draft article stipulates that the breach occurs at the time of the last constituent element of the complex act, but is then deemed to have begun at the time of the first constituent element. This retrospective generation of a breach of international law for which draft article 25, paragraph 3 provides is objectionable because the premise upon which it is based is, in the view of the United Kingdom Government, misconceived. If the "initial" State conduct breached the obligation, the "concluding" act simply completes the exhaustion of local remedies. If, on the other hand, no wrong arises until the concluding act occurs, that is because the obligation is simply to achieve a particular result by means of the State's own choosing, which obligation may be fulfilled through the availability of appeals procedures and discretionary remedies.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

France

In the view of France, article 26 should be retained in the draft since it establishes a classification of breaches on the basis of how the breach is committed. It also allows for the establishment of the dates of breaches, which is very useful in the context of a procedure for the settlement of disputes.

Germany

See article 24.

United States

See article 18.

Chapter IV. Implication of a State in the internationally wrongful act of another State

Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act

France

See article 28, paragraph 3.

Germany

As far as article 27 on "aid and assistance" is concerned, the German Government has some doubts as to whether this provision has a solid foundation in international law and practice.[43] It would appear that many of the situations envisaged by the Commission and quoted as examples of aid and assistance[44] actually refer to independent breaches of obligations under international law. For example, the action of a State allowing its territory to be used by another State for perpetrating an act of aggression as described in article 3 (f) of the Definition of Aggression[45] qualifies as an act of aggression and not as aiding aggression.

Should the Commission determine, however, that there is a solid foundation in international law and practice for the concept of "aid and assistance" in the field of State responsibility, it would certainly have to apply much more precision in clarifying the scope of the term "rendered for the commission" as a constitutive element. The requirement of intent in aiding and assisting the commission of an unlawful act also needs to be incorporated more clearly and unequivocally.

Switzerland

Draft article 27 introduces the concept of the implication of a State which has not necessarily acted in a wrongful manner. The Swiss delegation is of the view that this provision, which has no basis in positive law and would embody a purely causal responsibility, has no place in the Commission's draft and should therefore be deleted.

United Kingdom

The United Kingdom Government supports the basic principle adopted in draft article 27, but considers that the drafting leaves several important points unclear.

First, with regard to assistance that is not unlawful per se, it is clear that a State is responsible under the draft article only if it intends to give assistance to another State knowing that the assistance will be used for the purpose of committing an internationally

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[43] See Brownlie, *Principles of Public International Law*, 4th ed., 1990, pp. 456 et seq.; Ipsen, *Völkerrecht*, 3rd ed., 1990, pp. 521 et seq.; Vitzthum (ed.), *Völkerrecht*, 1997, p. 538.

[44] See *Yearbook ... 1978*, vol. II (Part Two), chap. III.B.2, commentary to article 27, pp. 99 et seq.

[45] General Assembly resolution 3314 (XXIX), annex.

wrongful act. But it is not clear whether the assisting State is responsible only in cases where it believes the conduct that it is assisting is unlawful, or whether the assisting State is responsible even if, while knowing what the assisted conduct will be, it believes that conduct to be lawful. In other words, it is not clear what effect a mistaken view of the law on the part of the assisting State would have in this context. This point would be important in cases where, for example, one State assists a forcible intervention by another in a third State, but regards the intervention as justified on humanitarian or other grounds. It may be thought that, to the extent that the State that is the perpetrator of the primary offence is at risk of being held responsible for its conduct whether or not it believed that its conduct was unlawful, so should "accessory" States that knowingly and intentionally assist its purpose. But no such conclusion is evident in the draft article or in the Commentary. This point might usefully be considered by the Commission.

Secondly, it is not clear whether, in the case of acts of assistance that are wrongful per se, the draft article introduces a distinct wrong, so that the conduct is wrongful on two counts – both under the rule which makes it wrongful per se, and under the draft article. This point may have practical importance. For instance, the "per se wrongfulness" may arise under a treaty, and that treaty may stipulate a particular procedure for dispute settlement. If draft article 27 creates a distinct wrong, dispute settlement procedures applicable to these draft articles would be applicable, which may permit or require a complainant State to circumvent the treaty-based dispute procedures. If, however, there are not to be two bases of wrongfulness in such cases, the question arises as to which is to be subsumed by the other.

A third point is related to the second. The draft article does not itself explicitly assert that there is an obligation not to aid or assist the commission of an international wrong by another State. Two interpretations of the effect of the article are possible. The draft article may create (or assert the existence of) such an obligation by implication. Alternatively, the article may carry no such implication, and may do no more than attach responsibility to conduct constituting aid or assistance, regardless of the existence of any obligation not to give aid or assistance. If the latter interpretation is correct, there is no indication of the time at which the wrongful act arises. That time could be when the assistance is given, or when the assistance is "used". The distinction is clear in the case of, for example, the provision of transport facilities. It would be preferable to make clear that it is the first interpretation that is correct, and that there is an international obligation not to aid the commission of an unlawful act. The time of the breach would then vary according to whether or not the aid was unlawful per se. If it was, the breach would occur when the aid was given. If it was not unlawful per se, the breach would arise only when (and if) the aid was used for an unlawful purpose, although it would presumably(applying the approach adopted in draft article 25) then be retrospectively dated back to the time when it was given. This interpretation would also provide an answer to the point raised in the previous paragraph. There would clearly be an obligation distinct from any obligation that might render the aid per se unlawful; and in such cases the rendering of assistance would be unlawful on two distinct grounds. If these uncertainties can be resolved, draft article 27 would be a helpful provision. The United Kingdom Government hopes that the Commission will give further thought to the precise manner in which the draft article might be applied in practice, and to the possible need for redrafting the article in order to make its implications clearer.

United States

Draft article 27 provides that assistance to another State constitutes an unlawful act "if it is established that it is rendered for the commission of an internationally wrongful act

carried out by the latter [State]". The United States agrees that circumstances may arise where two States act jointly in the commission of a wrongful act. [46]As a result, it is conceivable that an assisting State would be responsible for an action of the receiving State, but it is difficult, if not impossible, to imagine such responsibility of the assisting State in the absence of the actual commission of an unlawful act by the receiving State. To this extent, this is indeed a rule of joint responsibility where both States should be held responsible for unlawful action. At the same time, the rule as stated remains vague and would be difficult to apply in practice. For instance, what is the scope of the term "rendered for the commission"? We assume that the term means to cover the case where an assisting State intends to assist in the commission of an unlawful act. However, the phrase "rendered for" is rather obscure and may be interpreted as not requiring intent. That "rendered for" incorporates an intent requirement should be clarified in the text of the draft article.

Article 28. Responsibility of a State for an internationally wrongful act of another State

Switzerland

Draft article 28 concerns the responsibility of a State for exerting coercion to secure the commission of a wrongful act against a third country, as well as the responsibility of the State which was thus coerced to act. In the opinion of the Swiss delegation, the second aspect of the problem – the responsibility of the State victim of coercion – comes within the province of the provisions on circumstances precluding wrongfulness and should be dealt with under that heading.

Paragraph 1

France

Paragraph 1 illustrates a historically dated situation. It would in any event be desirable to replace the term "*contrôle*" by "*maîtrise*".

Paragraph 2

France

The term "coercion", without further qualification, is too loose. It would be better to speak of coercion "under conditions which are contrary to international law".

...

France proposes inserting the phrase "under conditions which are contrary to international law" after the phrase "An internationally wrongful act committed by a State as the result of coercion".

[46] See also Brownlie, *System of the Law of Nations* (op. cit., footnote 24), pp. 190-191.

Paragraph 3

France

Paragraph 3 shows quite clearly that there can be no substitution of responsibility. There can, on the other hand, be two concomitant responsibilities. This comment also applies to article 27.

Chapter V. Circumstances precluding wrongfulness

France

In the view of France, the following article could replace all of chapter V:

"[Article 18 *bis*

"The wrongfulness of an act of a State is precluded:

(a) in relation to a State which consented to it in conformity with international law;

(b) if the act constitutes a countermeasure (within the meaning of article 47);

(c) where the act constitutes a measure of self-defence in conformity with international law;

(d) if the act was due to an irresistible, external and unforseen event which made it materially impossible for the State to act in conformity with that obligation;

(e) if the State establishes that the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care; distress may not be invoked if the State in question has contributed to the occurrence of the situation or if the conduct in question has created a comparable or greater peril;

(f) if the act corresponds to a state of necessity under the following conditions:

(i) the act respects the international rules which are applicable in situations of necessity;

(ii) the State which invokes the state of necessity did not contribute to its occurrence;

(iii) the act is the only means of safeguarding an essential interest of the State invoking the state of necessity against a grave and imminent peril;

(iv) the act does not seriously impair an essential interest of a State towards which an obligation is in force.]"

Article 29. Consent

France

It would be appropriate to group the articles concerning consent, countermeasures and self-defence (articles 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (articles 31, 32 and 33).

United Kingdom

The decision of the International Law Commission that the exculpatory "defences" in draft articles 29 to 34 should preclude wrongfulness and not merely preclude responsibility entails the conclusion that a State that takes action which causes loss to another State or its nationals is, because its action is not unlawful, under no duty to pay compensation. The United Kingdom Government considers that this is entirely appropriate in circumstances where a State is acting with the consent of the State harmed (draft article 29) or is exercising in accordance with international law its right to take countermeasures (draft article 30) or its right of self-defence (draft article 34). In the case of consent validly given, there is no violation of international law, and therefore no question of wrongfulness should arise. In the case of exercises of the right to take countermeasures or to act in self-defence, the conduct of the State is by definition a consequence, specifically permitted by international law, of a prior wrongful act by another State. It is appropriate that a State that exercises these rights given to it by international law to protect its interests against the wrongful acts of another State should not be regarded as acting wrongfully, any more than it would if it were to exercise any other right under international law.

The United Kingdom Government also accepts that it might be appropriate to regard as being in principle "not wrongful" conduct resulting from irresistible forces creating a situation in which performance of the international obligation in question is materially impossible (draft article 31), because the "conduct" is by definition involuntary.

The United Kingdom Government thinks, however, that it would be useful to consider whether this approach to defences in international responsibility should operate in exactly the same manner in the context of the remaining circumstances precluding wrongfulness, i.e., distress (draft article 32) and necessity (draft article 33). In those cases, the State has a choice as to whether it complies with its international obligations or, in order to protect important interests, violates those obligations. In those circumstances, it may be preferable to adopt the view that the defences may excuse the wrongful conduct and in some circumstances release the State in question from the duty to make reparation for injury caused by it, but do not entirely preclude the wrongfulness of the conduct. On this basis the legal obligation would clearly survive, as would the obligation in principle to make reparation for any injury caused, and the State would be under a clear duty to return to compliance with the obligation. This possibility is one that the United Kingdom Government hopes the Commission will consider. The following comments (see articles 29, paragraphs 1 and 2, 31, 32 and 33) are made without prejudice to the general points made in the preceding paragraphs.

Paragraph 1

Austria

In paragraph 1, the expression "in relation to that State" should be further examined since there may exist some doubt concerning the logic of limiting the preclusion of wrongfulness to the consenting State.

France

It is not very clear what is to be understood by the expression "validly given". This seems to relate to defects of consent, taken from the law of treaties.

...

France proposes reformulating this provision as follows:

"1. The consent given by a State in conformity with international law to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent."

United Kingdom

The United Kingdom Government supports the principle in draft paragraph 1, that consent precludes the wrongfulness of (or at least, responsibility for) an act, but considers that it would be helpful for the International Law Commission to give further consideration to two issues.

The first is the question of the person or organ by which the consent of the State must be given. The Commentary[47] suggests that consent may validly be expressed by anyone whose acts are attributable to the State. The United Kingdom Government, however, considers that there is no necessary identity between the category of persons whose acts are attributable to the State and the category of persons competent to bind the State. Minor officials, for example, belong to the first but not the second category. It is hoped that the International Law Commission might give further consideration to this question. In particular, the questions of the extent to which consent may be given on behalf of a State by (a) minor officials, and (b) insurrectionists who subsequently become the Government of the State, require clarification.

A further aspect of the question – who may give the State's consent? – arises in the context of revolutionary groups. Under draft article 15, the acts of insurrectional movements that become the new Government of a State are to be regarded as acts of the State. A desire for theoretical consistency might suggest that expressions of "consent" by insurrectional Governments be treated in the same way. Typically, that consent might relate to intervention by forces of a third State in support of the insurrection, or to the non-fulfilment of a treaty obligation owed by a third State to the insurrectionists' State. It is generally neater to have all aspects of international responsibility that concern the acts of insurrectionists determined

[47] Commentaries, p. 216, para. 15

on the basis of the same principles. The policy considerations are, however, different in the two cases.

It is desirable that a new Government should not be able to escape international responsibility for the acts that brought it to power, especially as there is a particular likelihood of injury to foreign States and nationals during an insurrection. On the other hand, to entitle, as it were, successful insurrectionists to consent to departures from legal obligations owed to their national State might be thought to promote the non-observance of such obligations at a critical juncture for the State, and even to encourage intervention by third States in its internal affairs. It might therefore be thought preferable, in the interest of stability, to adopt the position that only the incumbent Government may consent to departures from legal obligations. Certainly, the new insurrectional Government could have no cause for complaint if third States did adhere to their legal obligations to the insurrectional State.

The policy argument against counting acts of successful insurrectionists as consent on behalf of the State is supported by another practical consideration. The Vienna Convention on the Law of Treaties makes no provision for the conclusion of international agreements by insurrectionists; and to the extent that the Vienna Convention is relevant to cases of insurrection, its provisions (notably articles 8 and 46) clearly suggest that insurrectionists cannot make treaties binding on the State. It is hard to see why insurrectionists should be entitled to achieve a modification of duties owed to their State by way of consent to departure from those obligations, when they could not do so by concluding a treaty modifying the same obligations. There are, then, arguments on both sides of this issue. There does not seem to be a decisive argument favouring either side. It is, however, desirable that the problem be addressed further by the Commission.

The second issue concerns the manner in which consent may be expressed. There are emergency situations in which it is appropriate to allow a State to take action to protect persons in another State from imminent and serious danger (for example, from risk of death from fire or flood), but where there may be insufficient time to obtain the consent of that other State. There may be a need to address, in the draft article itself or in the Commentary, the possibility of implied or retrospective consent. The United Kingdom Government hopes that the International Law Commission will consider whether it is possible, either in draft article 29 or elsewhere, to make express provision for a right to take such humanitarian action in emergency situations, with appropriate safeguards to protect the interests of the State in whose territory the action is taken.

Paragraph 2

Austria

Some States may have doubts regarding the practical relevance of excluding "consent" as a circumstance precluding the wrongfulness of an act of a State in the case of *jus cogens*.

France

For the reasons of principle stated above, the reference to *jus cogens* in ... article 29, paragraph 2 ..., should be deleted.

...

Paragraph 2 poses a problem because it refers to the concept of a "peremptory norm of general international law", which France does not recognize.

United Kingdom

The United Kingdom Government is unable to support paragraph 2, which precludes consent to a rule of *jus cogens*. The uncertainty which continues to surround the content of the category of *jus cogens* and the lack of any practical mechanism for resolving that uncertainty make the provision impractical.

Article 30. Countermeasures in respect of an internationally wrongful act

[See also part II, chapter III.]

France

The formulation "wrongfulness of an act of a State not in conformity with an obligation of that State" is pleonastic. Further, the term "legitimate" is not legally apt. Lastly, the title of the draft article is ambiguous inasmuch as the operative provisions of the article concern not only countermeasures enacted by States on an individual basis, in the exercise of their own authority and acting "at their own risk", but also coercive measures authorized or decided on by the United Nations. It would in any event be preferable to limit this article to countermeasures *stricto sensu*.

...

It would be appropriate to group the articles concerning consent, countermeasures and self-defence (articles 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (articles 31, 32 and 33).

...

France proposes reformulating this provision as follows:

> "An act of a State not in conformity with its obligation towards another State is not wrongful if the act constitutes a countermeasure (within the meaning of article 47) against that other State."

Mexico

The inclusion in the current formulation of the draft articles of an article on countermeasures in chapter V is inappropriate since, although Mexico is aware that countermeasures are an instrument used in practice by the community of States and that some of them have been incorporated in various kinds of international instruments, to state, as does article 30, that an originally wrongful act ceases to be wrongful under certain circumstances does not seem to accord with internationally recognized principles on the peaceful coexistence of States. The Government of Mexico would suggest, in any event, the inclusion in the draft articles of a paragraph strengthening precautionary measures, the aim of which would be to assist in the settlement of any dispute.

United Kingdom

The United Kingdom Government welcomes the acknowledgement in draft article 30 that States are entitled to resort to countermeasures. Were the draft article to stand alone, it would constitute a clear statement of that right; and the exercise of that right would be subject to the limitations that have emerged in State practice and to rules specially agreed by States (such as the relevant rules of the Vienna Convention on the Law of Treaties). In this respect draft article 30 would be comparable to draft article 34 on the right of self-defence. The United Kingdom Government commends this approach to the Commission.

It appears both unnecessary and undesirable to single out countermeasures as the one "circumstance precluding wrongfulness" whose content purports to be fixed by the draft articles. The United Kingdom Government would prefer that draft article 30 stand as the only provision on countermeasures, and that the context of the law on countermeasures be considered on another occasion. The United Kingdom Government does not consider that the elaboration of the content of the rules on countermeasures reflects the current state of customary international law, or that the draft articles represent a desirable development of it.

...

For all these reasons, the United Kingdom Government is strongly of the view that it is inappropriate to include any provision other than draft article 30 in these draft articles, and that the question of countermeasures needs careful and separate consideration.

See also articles 29, 48, 50 and 58.

United States

We support the draft article's reflection of the settled view that countermeasures "ha[ve] a place in any legal regime of State responsibility".[48] The article acknowledges that an otherwise unlawful act loses its unlawful character when it "constitutes a measure legitimate under international law" in response to a prior unlawful act.[49] We agree that draft article 30 concerns only acts of a State that are otherwise "not in conformity with an obligation of that State towards another State". Thus, the scope of the draft article does not extend to the entire range of responsive actions by States, such as measures of retortion, actions that might be termed "unfriendly" but that do not violate international obligations.[50]

Similarly, we do not understand draft article 30 to alter or otherwise affect the rights and obligations of States under the Vienna Convention on the Law of Treaties and the customary international law of treaties. The International Court of Justice recently has drawn an even sharper distinction with respect to treaty law and State responsibility, stating that

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[48] See fifth report, A/CN.4/453, para. 96.

[49] The difference between measures that are not wrongful and measures that are legitimate is not entirely clear from the text of article 30. "Legitimate" seems to be intended to mean "within the limitations on countermeasures provided in part two" (see Commentaries, p. 219). If so, the Commission might consider incorporating this definition directly in article 30.

[50] See e.g., O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* p. 44 (1988); D. Alland, "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility", in M. Spinedi and B. Simma, *United Nations Codification of State Responsibility* (1987), pp. 143 and 150.

"these two branches of international law obviously have a scope that is distinct".[51] A State may have a range of alternatives available under the law of treaties in response to a breach by another State of a provision of a treaty in force between the two States. The treaty may provide for specific responses, such as dispute settlement procedures or other measures. A State may also be entitled to reciprocal measures, which are outside the definition of countermeasures in article 30. The draft article should not be read as precluding States from taking measures designed to maintain "the condition of reciprocity in the law of treaties".[52]

In this connection, it bears noting that draft article 37 on *lex specialis* states that "the provisions of this Part [Two] do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act." The United States strongly supports the principle of draft article 37 and believes that it should also apply to part I of the draft. For instance, two States could devise an agreement where one of the circumstances precluding wrongfulness would not apply even where, in similar circumstances, the draft articles would indeed apply. Or parties could arrive at an agreement whereby each waives the rule of exhaustion of local remedies, even where that rule would normally apply under draft article 22.

Article 31. *Force majeure* and fortuitous event

Austria

Article 31 ... may also require more elaboration. The way the article is drafted, objective and subjective elements seem to be mixed in a manner likely to blur rather than determine the scope of *force majeure* or other external events as elements precluding wrongfulness. Austria, therefore wishes to request the ILC to inquire to what extent the concept of "material impossibility" could be further developed in relation to "fortuitous event" as an element precluding wrongfulness.

It is not to be ignored that the problems addressed by the draft article have far-reaching consequences which are likely to relate even to issues such as "due diligence" as a key element of the concept of prevention. There can be no doubt that the notion of due diligence needs further in-depth elaboration regarding its relevance in the context of State responsibility.

It should also be acknowledged that this notion was already frequently referred to by States in their practice, as can be gleaned from the various digests. Austria, for example, applied it in cases concerning State responsibility with regard to foreign nationals killed during civil riots on its soil.

France

There is an element of redundancy in the use of the expressions *"force majeure"* and "fortuitous event", which in fact relate to the same regime.

...

[51] *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 25 September 1997, para. 47.

[52] *See, e.g.*, E. Zoller, *Peaceful Unilateral Remedies* 18 (1984).

It would be appropriate to group the articles concerning consent, countermeasures and self-defence (articles 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (articles 31, 32 and 33). In the second group, in effect, the attitude of the victim is irrelevant, only objective facts (*force majeure*, distress, state of necessity) being taken into account.

United Kingdom

The principle of the defence of *force majeure* and fortuitous event in draft article 31 is not controversial, but the United Kingdom Government considers that it should be explicitly confined to circumstances in which: (a) there is a situation in which it is materially impossible for the State to comply with its international obligations, which situation (b) derives directly from factors or events that are both (c) exceptional and (d) beyond the control of the State. For instance, there is a clear distinction between circumstances where a State loses control of part of its territory, to insurgents for example, and circumstances where the State is unable to compel persons within the territory which is under its control to conduct themselves as they ought – perhaps because key workers are on strike. The former is an exceptional circumstance, and if it causes a State not to comply with its obligations it is appropriate that the wrongfulness be precluded. The latter is a constant risk which affects all States, all of the time; and it should not form the basis of a circumstance precluding wrongfulness. It is not apparent from the Commentary that the Commission has taken this view; indeed, it may be that the Commission has decided not to take this view.[53] The United Kingdom Government urges the Commission to consider the explicit adoption of this distinction, either in the Commentary or in the draft article itself.

See also article 29.

Paragraph 1

France

The article seems to expand the impossibility of performance as compared with article 61 of the 1969 Vienna Convention on the Law of Treaties and, in so doing, is likely to undermine the stability of established treaty regimes by covering new cases of wrongfulness. The expression "beyond its control"serves no purpose.

...

France proposes reformulating this provision as follows:

"1. An act of a State not in conformity with its obligation towards another State is not wrongful if the act was due to an irresistible, external and unforseen event which made it materially impossible for the State to act in conformity with that obligation."

Paragraph 2

France

Paragraph 2 adds nothing to paragraph 1, and could thus be deleted.

[53] See Commentaries, p. 228.

Article 32. Distress

France

The wording of the draft article should be such as to guard against the likelihood of the situation of distress being used for injurious ends. France proposes new wording to that end.

...

It would be appropriate to group the articles concerning consent, countermeasures and self-defence (articles 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (articles 31, 32 and 33). In the second group, in effect, the attitude of the victim is irrelevant, only objective facts (*force majeure*, distress, state of necessity) being taken into account.

Mongolia

Mongolia has doubts as to the appropriateness of including a provision on distress as a factor that could preclude wrongfulness. Therefore draft article 32 needs to be re-examined, especially in the light of increasing interdependence in the world as a result of the rapid progress in science and technology which also entails high-risk situations with far-reaching catastrophic consequences.

United Kingdom

The United Kingdom Government supports the principle of the defence of distress, set out in this draft article, but recalls the comment made in relation to draft article 29, that it is desirable that an explicit provision be made somewhere in the draft articles for emergency humanitarian action to be taken without risk of international responsibility.

In draft article 32, the reference to the availability of a defence in circumstances where an international obligation is breached in order to save the lives of "persons entrusted to [the] care" of the actor limits the applicability of the draft article in humanitarian situations. There is no defence if the conduct is aimed at saving the lives of persons who have not been entrusted to the care of the actor, whether or not there was anyone else in the vicinity who could have saved those lives. The United Kingdom Government recognizes the danger that the extension of the principle of distress might lead to abuse. Nonetheless, it considers that the benefits of facilitating humanitarian action have to be balanced against the risk of abuse, and what it would be regrettable if no formula could be devised to enable cross frontier actions to save life *in extremis*.

See also article 29.

Paragraph 1

France

France proposes inserting the phrase "the State establishes that" after the phrase "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if".

Paragraph 2

France

France proposes replacing the phrase "was likely to create" by the phrase "has created".

Article 33. State of necessity

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The issues relating to article 33 on state of necessity are important. The International Court of Justice, in its judgement of 25 September 1997 in the Gabcikovo-Nagymaros case,[54] expressed the view that important elements of article 33 reflect customary international law. In view of the delicate aspects relating to such a provision, the Nordic countries would like to highlight the important contribution of the International Law Commission in this context, while at the same time reserving their right to study the proposed provision in further detail.

France

It would be appropriate to group the articles concerning consent, countermeasures and self-defence (articles 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (articles 31, 32 and 33). In the second group, in effect, the attitude of the victim is irrelevant, only objective facts (*force majeure*, distress, state of necessity) being taken into account.

United Kingdom

The Government of the United Kingdom views with extreme circumspection the introduction of a right to depart from international obligations in circumstances where the State has judged it necessary to do so in order to protect an interest that it deems "essential". A defence of necessity would be open to very serious abuse across the whole range of international relations. There is a grave risk that the provision would weaken the rule of law.

[54] *Case concerning the Gabcikovo-Nagymaros Project* (Hungary vs. Slovakia), 25 September 1997.

The United Kingdom accepts all the same that further consideration is required as to whether there is a need for a provision concerning action taken by a State to cope with environmental emergencies which pose an immediate threat to its territory (as envisaged in the Commentary[55]). If so, this would be akin to *force majeure* or distress, and might be considered in that context. It would not, however, in the United Kingdom's view, provide in itself a sufficient basis for any wider provision concerning necessity.

See also article 29.

Paragraph 1

France

France proposes reformulating this provision as follows:

"1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act unless the State establishes that:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed; and

(c) the act did not infringe an international rule applicable in situations of necessity."

Paragraph 2

France

France proposes reformulating this provision as follows:

"2. In any case, a state of necessity may not be invoked by a State if that State has itself contributed to that state of necessity."

United Kingdom

The United Kingdom Government wishes to raise the question of the role of subparagraph (b), which disapplies the defence of necessity in cases where the obligation arises under a treaty which explicitly or implicitly excludes the possibility of invoking the defence of necessity. There seems to be no reason in principle why treaties should not also exclude other defences, such as *force majeure* or distress, and impose absolute liability. It may therefore be necessary to consider extending the application of paragraph 2 (b) to the other defences. This is one aspect of the broader question of the relationship between these draft articles and the law of treaties, on which comment was made above (see "General remarks").

[55] Commentaries, p. 246, para. 16.

Article 34. Self-defence

France

The draft article illustrates a too restrictive approach to self-defence. Instead of "taken in conformity with the Charter of the United Nations", it would be preferable to say "in conformity with international law".

It would be appropriate to group the articles concerning consent, countermeasures and self-defence (articles 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (articles 31, 32 and 33).

United Kingdom

See article 29.

Article 35. Reservation as to compensation for damage

Austria

Article 35 should be examined with regard to a possible reformulation. To the extent that the provision should pertain to liability for acts performed in conformity with international law, the provision would require a more specific formulation because it would otherwise lead to the danger of possibly undercutting the effect of circumstances precluding wrongfulness. A provision applying the exception under article 35 only to such acts for which international law provides a legal ground for compensation would suffice.

In this regard the Commission should, once again, spend some time on the organization of work regarding rules of international law governing liability and the duty to prevent damages and its systematic relationship with the rules on State responsibility.

France

The draft article envisages no-fault liability. France is of the view that it should be deleted, taking into account the comment made on article 1.

Germany

Germany agrees with the assumption underlying chapter V, that certain circumstances preclude wrongfulness. However, it would invite the Commission to re-examine article 35 stating a "reservation as to compensation for damage". Here we find ourselves at the borderline between State responsibility and liability for acts not contrary to international law. To what extent acts in conformity with international law give rise to a duty of compensation is currently unclear. Further, it would appear unsatisfactory if the Commission, while in article 33 precluding wrongfulness in a state of necessity, did not also deal with questions of redress for damage suffered by another State not responsible for that state of necessity.

United Kingdom

It was noted (see article 29) that the United Kingdom Government hopes that the Commission will consider whether it would be preferable to treat conduct covered by the "defences" of distress and necessity (draft articles 32 and 33) as unlawful. The exculpatory provisions of draft articles 32 and 33 would then be regarded as indications of the circumstances in which the international community would ordinarily tolerate non-fulfilment of obligations, in the sense of refraining from condemnation of the action.

The United Kingdom Government considers that where a State has chosen to take action for its own benefit, there is no reason in principle why that State, rather than the State against which the action was taken, should not bear the cost of doing so. The principle of unjust enrichment might offer a conceptual framework for consideration of the liability of the State taking the action to compensate the State that has suffered the loss. The United Kingdom therefore welcomes the acceptance in draft article 35 of the possibility that States might sometimes be obliged to pay compensation where they have acted in a manner covered by draft articles 32 and 33 and caused loss to others.

In the current scheme of the draft articles it seems that, because of the exculpatory effect of the chapter V defences, any duty to compensate in these circumstances would have to be treated as a matter of international liability for injurious consequences arising out of acts not prohibited by international law. There is therefore a need to establish the relationship between draft article 35 and the work of the International Law Commission on the question of injurious consequences arising out of acts not prohibited by international law.

Part Two
Content, forms and degrees of international responsibility

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The most difficult aspects of this part appear to be those related to "countermeasures" (chapter III) and "international crimes" (chapter IV).

Chapter I. General principles

Article 36. Consequences of an internationally wrongful act

France

France would suggest new wording for the draft article, taking into account the provisions of article 41. Article 41 could then be deleted.

Paragraph 1

France

France proposes reformulating this provision as follows:

"A State which has committed an internationally wrongful act is bound, with respect to the injured State, to perform the obligation it has breached or to cease any wrongful conduct having a continuing character."

Paragraph 2

France

France proposes reformulating this provision as follows:

"This obligation is without prejudice to the legal consequences of an internationally wrongful act as set out in this Part."

United Kingdom

The United Kingdom Government considers that paragraph 2 should be amended so as to make plain that, even though conduct exculpated by a defence under draft articles 29 to 35 is not wrongful, the duty to perform the obligation that is breached by the conduct persists. It would be preferable if paragraph 2 referred to the continued duty of the State which has failed to comply with its obligation (rather than "committed the internationally wrongful act") to perform the obligation it has breached.

Article 37. *Lex specialis*

Czech Republic

It is precisely on the subject of the specific consequences of a "crime" that the draft might be reworked; revisions could be proposed during the second reading with a view to clarifying further certain specific aspects of the regime of "crimes" without unduly changing the format out of the text. It would probably be useful, then, to take another look at the wording of draft article 37 with a view to making it clearer that the provisions of part two, when they deal with the regime applicable to "crimes", are no longer simply residual in character. Indeed, since "crimes" consist of breaches of peremptory rules (and not of any peremptory rule but only of those rules of *jus cogens* that are of essential importance for safeguarding the fundamental interests of the international community), the secondary rules applicable to them must also be peremptory in nature, with no possibility of derogating from them by means of an agreement *inter partes*.

France

In the view of France, articles 37, 38 and 39 could perfectly well be included in the final or introductory provisions of the draft articles. All three deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text.

Germany

See article 1.

Switzerland

Article 37 rightly provides that the rules of international law governing a particular situation should prevail over the general provisions contained in the draft articles. However, it might be appropriate to enter a reservation concerning article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties. These provisions enable a contracting party to terminate a treaty with respect to another party when the latter has violated the basic rules of the treaty. In view of the current wording of draft article 37, this specific reaction, which comes within the province of the law of treaties, could be considered as precluding all other consequences, namely, those deriving from the draft articles on State responsibility. This is not the case, and the situation should therefore be clarified.

United Kingdom

The European Community treaties are an example of a *lex specialis* modifying the incidence of many of the principles in the ILC draft.

See also "General remarks", above.

United States

See article 30.

Article 38. Customary international law

France

In the view of France, articles 37, 38 and 39 could perfectly well be included in the final or introductory provisions of the draft articles. All three deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text.

Article 39. Relationship to the Charter of the United Nations

Czech Republic

It must also be borne in mind – and this is clearly a very important factor – that in the field of the maintenance of international peace and security, which accounts for much of the action taken for the purpose of intervening in response to "international crimes" of States, there is in fact already a specific mechanism, which is appropriately covered by draft article 39.

France

In the view of France, articles 37, 38 and 39 could perfectly well be included in the final or introductory provisions of the draft articles. All three deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text.

Article 39 appears to run counter to Article 103 of the Charter of the United Nations, which makes no distinction between the provisions of the Charter. Would not such a clause have the effect of restricting the prerogatives of the Security Council? It would in any event be preferable to state that the provisions of these draft articles do not impair the provisions and procedures of the Charter of the United Nations, in accordance with Article 103 thereof.

...

France proposes reformulating this provision as follows:

> "The provisions of the present articles are without prejudice to the provisions and procedures of the Charter of the United Nations, pursuant to Article 103 thereof."

Mongolia

Any text dealing with State responsibility should take into full account the current situation concerning the measures which the United Nations is taking under Chapter VII of its Charter.

United Kingdom

The United Kingdom Government notes the request by the Commission for specific comments on the issues raised by draft article 39. However, it does not consider that the question of the relationship between the rights and obligations of States under the law of State responsibility and under the Charter of the United Nations should be addressed in these draft articles. That question raises complex issues, which concern not only the United Nations but also other international and regional organizations which may be acting in conjunction with the United Nations or in roles assigned to them under the Charter.

Without prejudice to the foregoing, the United Kingdom Government supports the principle of the pre-eminence of the Charter of the United Nations, which is reflected in Article 103 of the Charter and in draft article 39.

United States

The Commission has sought "quite specific comments by States"[56] with respect to the questions raised by draft article 39, which states that the "legal consequences of an internationally wrongful act" set out in the draft articles "are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security".

The United States agrees with the objective of the draft article in emphasizing that the Charter's allocation of responsibility for the maintenance of peace and security rests with the Security Council, and that an act of a State, properly undertaken pursuant to a Chapter VII decision of the Security Council, cannot be characterized as an internationally wrongful act. State responsibility principles may inform the Security Council's decision-making, but the draft articles would not govern its decisions.

The Charter states clearly that its obligations prevail over any other international agreements.[57] Article 103 not only establishes the pre-eminence of the Charter, but it makes clear that subsequent agreements may not impose contradictory obligations on States. Thus, the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security.

The responsibility of the Council, and the coordinate responsibility of Member States to implement Council decisions, pervades the Charter. Article 2, paragraph 5, states, for instance, that "all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter ..." In Article 25, "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Similarly, Article 48 commits Member States to take the "action required to carry out the decisions of the Security Council for the maintenance of international peace and security". In accordance with these Articles, therefore, Member States are obligated to "carry out" decisions of the Council under Chapter VII with respect to the maintenance of peace and security. The Charter does not provide an exception for existing obligations States might owe other States.

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[56] Commentaries, p. 139, footnote 226.

[57] Article 103 of the Charter reads:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The discretion of the Security Council, moreover, is broad.[58] Thus, the Council has authority to take all necessary action, consistent with the purposes and principles of the Charter, to maintain or restore international peace and security. The Council, in connection with its Chapter VII responsibilities, may "deny a State's plea of necessity" or "a State's right to take countermeasures".[59]

Article 40. Meaning of injured State

Austria

As far as part two, chapter I, on the consequences of violations of international law is concerned, the concept of "injured state" developed in article 40 has merits to the extent to which States are directly affected in their rights by violations of international law. The competence to invoke reparation, restitution in kind or compensation should therefore be made entirely dependent on the condition that a State has been directly affected in its rights by a violation. However, doubts may be raised as to whether this concept is also workable in cases where a directly affected State cannot be singled out, such as in the case of human rights violations and the breach of obligations owed to the community of states parties as a whole.

France

The unfortunate ambiguity that results from the unwillingness to include the concept of damage among the requisites for bringing about a relationship that entails responsibility is altogether obvious in article 40. It is unclear what exactly is meant by a "right" whose infringement injures a State. The term is no doubt used in order to avoid referring to "damage" (which indeed constitutes an infringement of a right).

It is necessary to introduce into the draft article the idea that the injured State is the State that has a subjective right corresponding to obligations incumbent on clearly identified States. Article 40 should therefore make express reference to the material or moral damage suffered by a State as a result of an internationally wrongful act of another State.

France is not hostile to the idea that a State can suffer legal injury solely as a result of a breach of a commitment made to it. However, the injury must be of a special nature, which is automatically so in the case of a commitment under a bilateral or restricted multilateral treaty. By contrast, in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule. A State cannot have it established that there has been a violation and receive reparation in that connection if the breach does not directly affect it.

Germany

Article 40 is designed to determine which State or States are legally considered an "injured" State or States. As the Commission has rightly pointed out, this determination

[58] See Charter of the United Nations, Article 24, paragraph 2.

[59] Commentaries, p. 139, footnote 226.

is obviously connected with the origin and content of the obligation breached by the internationally wrongful act in question, in the sense that the nature of the "primary" rules of international law and the circle of States participating in their formation are relevant to the indication of the State or States "injured" by the breach of an obligation under such "primary rules".[60]

Switzerland

Draft article 40, which defines "injured State", also includes seemingly obvious elements, i.e., paragraph 1, which stipulates that the injured State must possess the infringed right.

Uzbekistan

Draft article 40 should be transferred to part two, chapter II, which contains provisions dealing with the rights of the injured State and obligations of the State which has committed an internationally wrongful act.

Paragraph 2

Austria

Systematically, the approach chosen by paragraph 2 (e) and (f) as well as paragraph 3, which concern acts violating international law with *erga omnes* effect, should be dealt with in a separate manner. The concept chosen in article 40 would lead to a competitive or cumulative competence of States to invoke legal consequences of a violation of international law. This could in concrete cases lead to absurd results, given the absence of any world authority deciding upon the competence of States to invoke *erga omnes* violations of international law.

The rights of States to invoke such violations should therefore be limited to specific legal consequences, namely the obligation to cease wrongful conduct and the reparation of the victims of violations of international law. This approach would adequately address the problem of the cumulation of the right of a multitude of States to invoke such violations and their legal consequences. Such limiting of the competence of States to invoke the consequences of *erga omnes* violations would not seriously hamper the capacity of the community of States under existing international legal procedures to react to violations of international law with *erga omnes* effect. In this context, reference can be made to the procedures under the Charter of the United Nations regarding the maintenance of international peace and security and the protection of human rights and fundamental freedoms.

Austria therefore expects the International Law Commission to undertake a revision of article 40 as well as of chapter II of part two of the draft articles.

[60] See *Yearbook ... 1985*, Vol. II (Part Two), chap. III B 2, commentary to article 5, at pp. 25 *et seq.*

France

The drafting of paragraph 2 (f) allows any State party to a multilateral treaty to entail the responsibility of another State party where collective interests are involved. It is in fact completely inappropriate to allow States to so intervene in situations which are not of direct concern to them.

Germany

The German Government would submit that the abstract concept formulated in paragraph 2 (e) and (f) in fact does not adequately take into account the wide variety of rules, both conventional and customary, that may or may not provide a basis to claim injury and reparation under well-developed legal regimes. As far as conventional rules are concerned, the Commission would need to clarify a possible overlap of paragraph 2 with article 60 of the Vienna Convention on the Law of Treaties on termination or suspension of a treaty due to material breach, bearing in mind that the law of treaties and the law of State responsibility have a scope that is distinct.[61]

United Kingdom

The United Kingdom Government has no comment on the greater part of draft article 40. It does, however, wish to comment on paragraph 2 (e).

First, there is the question of the consistency of paragraph 2 (e) (ii) with article 60, paragraph 2 (c), of the Vienna Convention on the Law of Treaties. Both paragraph 2 (e) as currently drafted and article 60 of the Vienna Convention are concerned with the concept of an "injured State" in circumstances where legal obligations have been violated. Both, indeed, are explicitly applicable to breaches of treaty obligations. The Vienna Convention treats a State as "injured" by a breach by another State party only if the breach (a) is material and (b) "radically changes the position of every party with respect to the further performance of its obligations under the treaty". That appears to be a narrower formulation than that adopted in the draft of paragraph 2 (e) (ii), which refers to situations where the infringement of a right under a multilateral treaty or under customary international law "necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law".

The main difference is the gap between a breach that "necessarily affects the enjoyment of ... rights" (para. 2 (e) (ii)) and a breach that "radically changes the position ... with respect to the further performance of ... obligations" (Vienna Convention, article 60). The United Kingdom Government recorded above its view that it is desirable that the International Law Commission consider and clarify the relationship between the draft articles as a whole and the Vienna Convention on the Law of Treaties. Draft article 40 is one of the articles particularly affected by this problem.

The United Kingdom Government is also concerned that the criterion in paragraph 2 (e) (ii) is too vague. It might, for example, be said that an act of transboundary atmospheric pollution in breach of a treaty necessarily affects the enjoyment of the right of all States

[61] See *Case concerning the Gabcikovo-Nagymaros Project* (Hungary vs. Slovakia), 25 September 1997, para. 47.

to be free from such pollution, even if the State raising this argument cannot prove any material detriment to its own territory. It has the right not to have others pollute its atmosphere; it knows, as a matter of a priori reasoning, that pollution from State X is contributing to the build-up of atmospheric pollution; ergo, it is a State injured by the action of State X. The Vienna Convention approach has the effect of limiting the concept of the injured State to those States that are materially affected. That is an approach that the United Kingdom Government considers both practical and principled; and it would encourage the Commission to consider applying it in the context of draft article 40.

Such an approach might also be helpful in the context of multi-party disputes. As was noted above in relation to countermeasures (see article 30), situations may arise in which one State breaches an obligation owed to several States. The State principally affected may acquiesce in the breach. It would be helpful for the Commission to consider whether there are any circumstances in which the right of States to consider themselves "injured", and hence entitled to exercise the powers of "injured States", should be modified if the State principally injured has indicated that it has decided freely to waive its rights arising from the breach or if the State consents to the "breach".

The United Kingdom Government also notes that if compensation is to be recoverable under draft article 35, the definition of an injured State needs to be modified in order to include States injured by acts that are not internationally wrongful.

United States

As discussed above, the United States has identified serious flaws in the draft's definition of an injured State as including all states in the context of "State crimes". A similar problem may be found in draft paragraph 2 (e) (ii) to (iii) and (f). These provisions define injury on an abstract basis, without accounting for the wide variety of rules, both conventional and customary, that may provide standing to claim injury under well-developed regimes. Thus, while the draft recognizes the inherent difficulties in defining "injured States" in the context of multilateral treaties and customary international law, these provisions lead to unacceptable and over-broad conceptions of injury.

As currently drafted, paragraph 2 (e) (ii) provides that a State may claim injury where the right arises from a multilateral treaty or rule of customary international law and its infringement "necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law". To the extent that this draft article concerns multilateral treaty rules, the United States thinks that standing to claim injury would be governed by the specific treaty concerned and, as appropriate, the law of treaties.[62] Thus, paragraph 2 (e) (ii) should concern only customary international law. Further, the phrase "necessarily affects the enjoyment" is left undefined and could therefore be elastic and uncertain in application. The United States would propose the addition of an explicit limiting principle of

[62] Paragraph 2 as currently drafted does not adequately explain the extent to which its provisions overlap the customary international law of treaties and the Vienna Convention on the Law of Treaties. In particular, article 60 of the Vienna Convention provides specific rules for the situation involving a "material breach of a multilateral treaty by one of the parties". Where the draft discusses rights infringed under treaties, it does not develop whether such infringements are akin to material breaches of a treaty or amount to something less. To the extent that the two concepts of infringed right and material breach overlap, the Commission should clarify that the Vienna Convention would govern interpretations of specific treaty regimes and injuries sustained therein.

interpretation, such as language providing that an infringement must "materially impair" the rights of the allegedly injured State.[63]

Paragraph 2 (e) (iii) states that an injury to any party may arise where the violation concerns a "right [that] has been created or is established for the protection of human rights and fundamental freedoms". A basic principle of human rights law is that because such violations often go unchallenged, means must be devised whereby other States may demand compliance with the law and international institutions may exercise their authority to ensure compliance. Human rights conventions often provide substantive bases upon which all States have a right to monitor and demand compliance with such rights. Such *erga omnes* rules are well established in State practice with respect to human rights treaties.

Yet the right to claim reparation as an injured State for a violation of human rights is ill-defined by the draft articles. To the extent that the draft articles attempt to assimilate into the requirement of reparation "human rights and fundamental freedoms", the regime of State responsibility becomes a statement of principles which few States, and still fewer tribunals and international organizations, will find useful. With respect to such "injuries" as defined here, there is no support in international practice for providing all States with the *locus standi* to seek reparation in cases where they have not been harmed in the sense provided by a particular rule of law. Indeed, it is unclear how a State might assert a claim in the absence of any substantive right provided to it under an established rule of law.

Finally, draft paragraph 2 (f) provides standing to a State where the allegedly infringed right, found in a multilateral treaty, "has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto." While the phrase "expressly stipulated" suggests a narrowing function, the draft and the Commentaries do not define the term "collective interests". The draft may intend this phrase to cover specific kinds of interests found in specific categories of treaties. The Commission should clarify the meaning of "collective interests" in the text of the provision.

Paragraph 3

Austria

See paragraph 2 above.

Czech Republic

The draft still contains by no means negligible specific elements relating to the regime of responsibility for crimes that justify the distinction made in article 19. For example, the provision set out in article 40, paragraph 3, is certainly not insignificant, and it has important consequences in terms of both reparation and countermeasures.

France

Paragraph 3, which deals with an "international crime", is not acceptable.

...

[63] Cf. Commentaries, p. 273 (referring to article 60, paragraph 2 (c) of the Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, Vol. 1155, p. 331.

France proposes deleting this paragraph and reformulating the article as follows:

"[1. For the purposes of the present articles, 'injured State' means a State which has sustained, or a State a national of which has sustained, material or moral damage arising from an internationally wrongful act of another State.

"2. Infringement of a right and damage arise from the breach of an international obligation by another State, regardless of the origin, whether customary, conventional or other, of that obligation.

"3. An 'injured State' is a State in respect of which it is established that:

(a) the damage it has sustained arose from the infringement of a right expressly created or established in its favour or in favour of a category of States to which it belongs; or

(b) the damage it has sustained arose from the infringement of rights expressly stipulated for the protection of a collective interest arising from an instrument by which it is itself bound; or

(c) the enjoyment of its rights or the performance of its obligations are necessarily affected by the internationally wrongful act of another State; or

(d) the obligation breached was established for the protection of human rights or fundamental freedoms.]"

Germany

The German Government is of the opinion that the approach chosen by the Commission tends to broaden the circle of injured States beyond what appears to be legally accepted and workable in practice. While the concept of obligations *erga omnes* is an established and widely accepted one, violations of such obligations do not necessarily affect all States in the same manner. The Commission should study whether provision could be made for different categories of "injured States", leading to different "rights of injured States". For instance, while all injured States could well be seen as entitled to call for the cessation of an unlawful conduct or for the fulfilment of an obligation, the right to claim reparation might be limited to those States that have been "materially impaired" in the sense provided by the primary rule in question. This approach would leave unaffected the possibilities of the community of States as a whole under existing international legal procedures, such as the ones provided by the Charter of the United Nations, to react to a violation of international law with *erga omnes* effect.

Switzerland

Another element of the distinction between delicts and "crimes" emerges from paragraph 3. If a "crime" is committed, all States other than the perpetrating State could claim to be "injured States" and are bound to attach to the crime the consequences set out in draft article 53. However, to the extent that the concept of "crime" overlaps with a violation of the peremptory norms of international law, all States could consider themselves injured within the meaning of draft article 40, paragraph 3, even without determining whether the conduct contrary to *jus cogens* is or is not considered a "crime". In order to attach especially severe consequences to certain types of conduct, it is therefore not necessary to include paragraph 3 or to criminalize the types of conduct arising therefrom.

United States

Crime and injury

Paragraph 3 provides that all States may be considered injured "if the internationally wrongful act constitutes an international crime". There is a wide variety of legal norms in which many or all States (or the international community "as a whole") have an interest. But specific regimes distinguish between "interest" and "standing", which the concept of criminal injury elides. State X may have a generalized interest in the adherence by other States to particular norms of international law, out of a concern for precedent or because the norm itself is an important matter of policy for the State. Given such an interest, State X may have the right to demand a cessation of unlawful conduct. Thus, draft article 41, by focusing on the obligation of a wrongdoing State to cease wrongful conduct rather than the remedies available to an injured State, suggests that injury is not a prerequisite to a demand for cessation. Nonetheless, State X may not have the *jus standi* in a particular case to pursue the remedies provided under articles 42 to 45. Standing depends upon the primary rules applicable in a particular case, according to which a State might be able to assert that it has been "given a right of action".[64]

The definition of an injured State in paragraph 3 provides, however, that all States have standing to assert injury with respect to a crime, a situation that could lead to disruptive results.[65] While the concept of an injured community bears logical and jurisprudential weight, and is reflected in the responsibility of the United Nations Security Council to maintain international peace and security, it is unclear how a State may claim standing in the absence of a substantive rule of law granting it. Further, the motion in paragraph 3 that all States, individually rather than collectively, are injured by criminal violations raises particular concerns with respect to the responsibility of reparation. In particular, the draft's "construction might lead to a juridical 'overkill' by turning loose a sort of international vigilantism".[66] In fact, it would appear that an individual State would have available the panoply of rights to reparation even where it could not identify a substantive rule upon which it based its claim. (See draft articles 51 and 52). Thus, multiple claims for reparation could result in inadequate compensation for those States that can indeed identify injury.

Under several substantive rules of law, particularly in the area of humanitarian law, all States parties have the ability to call for the cessation of unlawful conduct and for reparation to be provided to the injured State. At the same time, a wrongful act might principally affect one State, but widespread injuries might be suffered by a number of States (e.g., the Iraqi invasion of Kuwait principally injured Kuwait, yet a number of other States and their nationals suffered injury in the course of the invasion). To the extent that a wrongful act inflicts widespread injuries upon a number of States, the determination of damages should take account of the consequences of the wrongful act, rather than its abstract

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[64] *South West Africa, Second Phase, Judgement, I.C.J. Reports 1966*, p. 6, at p. 388 (dissenting opinion of Judge Jessup). As Judge Jessup noted, this may be true under certain "accepted and established situations" even where the State does not show "individual prejudice or individual substantive interest as distinguished from the general interest". *South West Africa Case* at 388.

[65] Cf. B. Simma, "International Crimes: Injury and Countermeasures", in Weiler, Cassese and Spinedi (eds.), *International Crimes of State*, pp. 283, 285 (1989) (discussing concept of "community interest").

[66] *Idem*, p. 299.

gravity.[67] But the circle of States considered to have standing to claim reparation should be limited to those that identify a particular provision of law (outside the draft articles) granting them such a right.

Chapter II. Rights of the injured State and obligations of the State which has committed an internationally wrongful act

Mongolia

Mongolia finds acceptable the way the rights of the State that is wrongfully injured have been defined.

Article 41. Cessation of wrongful conduct

France

With regard to article 36, France would suggest new wording, taking into account the provisions of article 41. Article 41 could then be deleted.

United Kingdom

This draft article, as currently drafted, obliges only States that are acting wrongfully to cease their wrongful conduct. The United Kingdom Government considers that it would be helpful to record in the Commentary that a State which acts in breach of an international obligation, but whose conduct is exculpated under draft articles 29 to 35, remains under a duty to act in accordance with its international obligations and is internationally responsible if it fails to do so immediately when the circumstances generating the defence cease to obtain.

Article 42. Reparation

Mongolia

Mongolia welcomes the principle of full reparation reflected in the draft article. In this connection it wishes to emphasize that compensation not only may but *should* include interest and, where appropriate, loss of profits.

[67] Moreover, the draft articles already implicitly distinguish among the seriousness of violations. Under customary law, the consequences of violations depend on the nature of the violation. Draft article 44, paragraph 1, provides that an injured State is entitled to compensation "for the damage caused by that act", which is measured by the pecuniary value of returning the injured party to the status quo ante. As a result, it becomes unclear just what the concept of State crimes adds to the question of reparation for a violation of an international obligation.

Paragraph 1

France

France proposes replacing the phrase "restitution in kind" by the phrase "re-establishment of the pre-existing situation".

Germany

With the hesitations recorded above, Germany is in agreement with the basic rule, contained in paragraph 1, that the injured State is entitled to full reparation in the form mentioned. Some doubt exists, however, as to whether the injured State has, under customary international law, the right to "guarantees of non-repetition". The words "singly or in combination" seem to provide some flexibility as to what form reparation has to take in a specific case. To impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate.

United States

While the draft articles restate the customary obligation to provide reparation, they also create several significant loopholes that might be exploited by wrongdoing States to avoid the requirement of "full reparation" identified in draft paragraph 1.

Paragraph 1 appears to state correctly that a wrongdoing State is under an obligation to provide "full reparation" to an injured State, in addition to ceasing unlawful conduct as required by customary law and set forth in draft article 41. Nonetheless, the Commission has provided two potentially significant exceptions from the general principle of full reparation.

Paragraph 2

France

The formulation in paragraph 2 (b) should specifically cover diplomatic protection.

France proposes replacing the phrase "a national of that State on whose behalf the claim is brought" by the phrase "a national of the State exercising diplomatic protection".

United Kingdom

The United Kingdom Government regards the draft article as largely uncontroversial, but has reservations concerning paragraphs 2 and 3. Both paragraphs give rise to the question whether the determination of reparation is a question of general international law or a question of the powers of the particular body making the determination. While the United Kingdom considers that it is permissible for States to establish an international tribunal and to give it specific directions concerning the approach that it must adopt towards reparation, it considers that there may be some advantage in spelling out general principles concerning reparation.

Paragraph 2 specifies that "the negligence or the wilful act or omission" of the injured State (or its injured national) are to be taken into account when reparation is determined. Those factors are not themselves controversial. It is, however, difficult to see why negligence and wilful wrongdoing are singled out for express mention. The nature of the rule that has been violated and of the interest that it is intended to protect, for example, are other factors that might be thought equally deserving of express mention, given that the provision is concerned with reparation as a whole and not merely with compensation. The Government of the United Kingdom is, moreover, concerned that this reference to what appears to be a doctrine of contributory fault or negligence is attempting to settle as a general principle of State responsibility a question that is properly an aspect of particular substantive rules of international law. The Government hopes that the Commission will reconsider this provision.

The prohibition in paragraph 3 on reparation which deprives the population of a State of its own means of subsistence is more problematic. The deprivation of means of subsistence had some meaning in the context of the affirmation of sovereignty over natural resources, but has no clear meaning here. Reparation is defined in paragraph 1 of the draft article. It includes restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition. Nothing in that provision would enable a tribunal to confiscate the means of production from a State. Restitution is the restoration of the status quo ante; compensation is a matter of money and not of the means of subsistence; and the other remedies are not material. Paragraph 3 can therefore only refer, and that imprecisely, to compensation. But it is not clear what level of financial hardship is contemplated, nor how it is to be determined if that level has been reached in any particular case. Is the level the same for all States, for example? And is it permissible to take into account assets held abroad by States? Moreover, if ability to pay is the real issue in paragraph 3, it is difficult to see why that should not be a factor in all cases, whether or not it is argued that there is a risk of the population losing its means of subsistence.

The United Kingdom Government considers that it would be helpful to have a statement of principle concerning the making of reparation and that the point should be made that an injured State cannot insist upon a particular kind or level of reparation. The United Kingdom believes that draft article 42 could usefully be modified. There might be a separate article stipulating that the right to reparation, in whatever form is to be implemented taking into account, *inter alia*, the importance of the rule and of the interest protected by it, the seriousness of the breach (and perhaps the degree of negligence or wilful misconduct involved) and the need to maintain international peace and security and to bring about the settlement of international disputes in conformity with principles of international law and justice. The article might then state that when a determination is made as to the precise form that reparation should take, account should be taken of the principle that the form of reparation imposed should not impose a burden on the State making reparation out of all proportion to the benefit that the injured State would derive from some other form of reparation.

United States

Paragraph 2 provides vaguely for an "account[ing]" of "the negligence or the wilful act or omission" of the injured State or national "which contributed to the damage". It is unclear whether this subsection intends to impose a concept of contributory negligence, which under a common law approach might completely negate the responsibility of the

wrongdoer,[68] or whether it foresees some partial deviation from the "full reparation" standard. Paragraph 2 could be read as incorporating a contributory fault standard, allowing a wrongdoing State to avoid its obligation to provide reparation simply by positing the negligence of the injured State. Such a standard, the United States suspects, would be unacceptable to most States, as it is to the United States.

The commentary to paragraph 2 suggests that the drafters may have intended to express a comparative fault principle.[69] The United States appreciates the difficulties posed by the circumstance where an injured State or national bears some responsibility for the *extent* of his damages.[70] However, the concept of comparative fault is neither established in the international law of State responsibility nor clearly explicated in paragraph 2.[71] What is more important, comparative fault introduces an imprecise concept susceptible to abuse by wrongdoing States which might argue that the principle of comparative fault should be applied to relieve them of the responsibility to provide reparation.

Paragraph 3

France

Paragraph 3 should be deleted. There is no apparent justification for its inclusion in an article on reparation.

Germany

The German Government would tend to agree that the rule contained in paragraph 3 has its validity in international law and in the context of the draft article. As has been stated in the report of the International Law Commission on the work of its forty-eighth session, there are examples in history of the burden of full reparation being taken to such a point as to endanger the whole social system of the State concerned.[72] The German Government would also agree with the finding that paragraph 3 has nothing to do with the obligation of cessation, or the obligation to return to the injured State, for example, territory wrongfully seized.

A thorough review of international practice might reveal that the principle of full reparation has been applied primarily in the context of arbitral awards that concerned individuals, not in the context of violations having such disastrous effects as war. It would appear that, in such circumstances, settlements, if they have been obtained, refrain from awarding full reparation for every single damage sustained.[73]

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[68] See, e.g., Dobbs, Torts and Compensation: *Personal Accountability and Social Responsibility for Injury*, 2nd ed. (1993), p. 256.

[69] See Commentaries, p. 278 ("to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory").

[70] For instance, an injured State might in some circumstances be under a duty to mitigate its damages, analogous to the rules of contract law. See, e.g., M. Whiteman, *Damages in International Law*, vol. I (1937), pp. 199-216; and G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996), pp.300-303.

[71] Cf. Commentaries, p. 278, footnote 160.

[72] See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 152, paras. 8 (a) and (b) of the commentary to article 42, para. 3.

[73] See Tomuschat, *Gegenwartsprobleme der Staatenverantwortlichkeit in der Arbeit der Völkerrechtskommission der Vereinten Nationen* (1994), pp. 11 *et seq.*

On the other hand, it should be mentioned that Security Council resolutions 662 (1990) and 687 (1991) declare that a State committing an act of aggression is liable to make full reparation. The Commission might want to draw some conclusions from the manner in which the resolutions are implemented.

United Kingdom

See paragraph 2.

United States

The second loophole is created by paragraph 3. It states, without support in customary international law, that reparation shall never "result in depriving the population of a State of its own means of subsistence." While there may arise extreme cases where a claim for prompt reparation could lead to serious social instability, the language of article 42, paragraph 3 could provide a legal and rhetorical basis for a wrongdoing State to seek to avoid any duty to provide reparation even where it has the means to do so. The draft article provides too subjective a formula, opening too many avenues for abuse. The Commentaries suggest that "[s]ome members disagreed with the inclusion of paragraph 3". See Commentaries at p. 279. The United States agrees with the objectors; the inclusion of article 42, paragraph 3 in the draft articles is unacceptable.

Article 43. Restitution in kind

France

France is of the view that it would be preferable to use the expression "re-establishment of the pre-existing situation" rather than "restitution in kind", which might suggest simple restitution of an object or a person.

France proposes replacing the phrase "restitution in kind" by the phrase "re-establishment of the pre-existing situation" in the title, the *chapeau* and subparagraph (c).

France proposes deleting subparagraph (b). The subparagraph is not satisfactory since it refers to the concept of a "peremptory norm of general international law". It is also hard to understand how the restoration of lawfulness could be contrary to a "peremptory norm of general international law".

Subparagraph (d) should be deleted, as it adds nothing to the provisions of subparagraph (c).

United States

Restitution in kind has long been an important remedy in international law and plays a singular role in the cases where a wrongdoing State has illegally seized territory or

historically or culturally valuable property.[74] Still, compensation appears to be the preferred and practical form of reparation in State practice and international case law.[75] ("it is also clear that *in practice* specific restitution is exceptional") (emphasis in original).

Draft article 43 nonetheless provides two exceptions which the Commission might usefully clarify. Subparagraph (c) provides that restitution in kind may "not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation". This exception may enable States to avoid the duty to provide restitution in kind in appropriate circumstances. To the extent that the phrase "a burden out of all proportion" is left undefined, this exception would undermine the useful principle that restitution is preferred in some circumstances.

Subparagraph (d) precludes restitution where it would "seriously jeopardize the political independence or economic stability" of the wrongdoing State. Such broad terms, left undefined and without an established basis in international practice, provide nothing to injured States but give hope to wrongdoing States seeking to avoid providing an appropriate remedy. In particular, the draft does not explain just what "serious" jeopardy might include. While subparagraph (d) may have relatively limited practical effect given the priority of compensation over restitution in practice, the inclusion of broad concepts providing for the avoidance of responsibility is likely to have effects beyond the narrow provision of article 43. The United States urges the Commission to delete the provision.

Uzbekistan

In the *chapeau* of article 43, a provision should be added to the effect that, if restitution of objects having individual characteristics is not possible, objects of the same kind or nearly identical objects may, by agreement, be substituted for them.

Article 44. Compensation

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

It may be pointed out, in particular with reference to article 44, that issues relating to the assessment of pecuniary damage are both highly complex and important. The Nordic countries feel that some guidance based on codification of customary law would have been useful in this respect.

France

In 1989, the Special Rapporteur envisaged[76] various forms of compensation, which have not been included in the current article, which is much more abridged. It would be useful to revert to a more analytical version, adding elements of the earlier text. The current, overly concise, drafting stands in contrast to the degree of detail in articles 45 and 46.

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[74] *See, e.g., Chorzow Factory* case, *P.C.I.J., Series A*, No. 13, p. 47; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), I.C.J. Reports 1962*, p. 6, at pp. 36-37.

[75] *See, e.g.*, Brownlie, op. cit. (footnote 24), p. 211.

[76] See second report, *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, chap. II.

Germany

See article 45.

Mongolia

Mongolia welcomes the principle of full reparation reflected in the draft article. In this connection it wishes to emphasize that compensation not only may but should include interest and, where appropriate, loss of profits.

United Kingdom

The United Kingdom Government considers that, to the extent that it represents the actual loss suffered by the claimant, the payment of interest is not an optional matter but an obligation. Draft article 44 should be amended accordingly.

United States

Draft article 44 states the long-established principle reflected in customary international law and innumerable bilateral and multilateral agreements that a wrongdoing State must provide compensation to the extent that restitution *in integrum* is not provided. The principle was stated clearly by the Permanent Court of International Justice in the *Chorzow Factory Case*, where it noted that the appropriate remedy is "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear".[77] The principle has been applied to wrongful death cases as well.[78] The third element of moral damages is discussed below (see article 45).[79]

[77] See *Chorzow Factory Case* at p. 47. See also cases cited in Garcia Amador, fourth report, A/CN.4/119, pp. 46-54; F. A. Mann, *Studies in International Law* (1973), 475-476.

[78] See *Lusitania Cases* (United States v. Germany), Mixed Claims Commission, Administrative Decisions and Opinions of a General Nature, at 14, 19-20 (1923) (holding that compensation would include, *inter alia*, "the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant ... [and] (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision".

[79] See also *Chile-United States Commission Convened under the 1914 Treaty for the Settlement of Disputes: Decision with regard to the Dispute concerning Responsibility for the Deaths of Letelier and Moffitt, International Legal Materials*, vol. XXXI, p. 1 (1992). The Security Council affirmed the principle that Iraq is responsible for damages arising out of the Gulf War. See Security Council resolution 687 (1991). The United States has applied the Lusitania standard in a number of wrongful death cases which it has espoused and settled with other States. See, e.g., "Damages for Wrongful Death: United States-Iraq: USS *Stark*", in M. Nash, *1981-1988 Cumulative Digest of United States Practice in International Law*, pp. 2337-2340 (discussing United States claim against Iraq arising out of attack on United States missile frigate USS *Stark*).

Paragraph 1

France

France proposes replacing the phrase "restitution in kind" by the phrase "the re-establishment of the pre-existing situation".

Paragraph 2

France

France proposes reformulating this provision as follows:

> "For the purposes of the present article, the compensable damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link."

United States

Paragraph 2 provides an unacceptable qualification to the requirement of "any economically assessable damage" by stating that interest "may" be covered. The Special Rapporteur recognized that both State practice and the literature "seem[ ] to be in support of awarding interest in addition to the principal amount of compensation".[80] The suggestion of the draft article itself, however, is that interest is not required. This suggestion goes counter not only to the overwhelming majority of case law on the subject but also undermines the "full reparation" principle. Numerous instances of international practice support the provision of interest.[81] The most significant and contemporary reflection of customary law concerning compensation may be found in the holdings of the Iran-United States Claims Tribunal, which has consistently awarded interest as "an integral part of the 'claim' which it has a duty to decide".[82] Similarly, the United Nations Compensation Commission, responsible for assessing damage and distributing awards for claims arising out of Iraq's invasion of Kuwait, decided that "interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award".[83] The few contrary decisions do not undermine the near universal acceptance in international practice and arbitration of the necessity of the provision of interest in the award.

The Commission should close this loophole by stating that compensation "shall include interest", a proposition that expresses clearly and correctly the content of the law and

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[80] Arangio-Ruiz, second report, A/CN.4/425, pp. 57-59.

[81] See, e.g., *S. S. "Wimbledon" case*, 1923 *P.C.I.J., Ser. A*, No. 1, pp. 15, 33; *Chorzow Factory case*, p. 47; *Illinois Central Railroad Co. v. United Mexican States*, *United Nations Reports of International Arbitral Awards*, vol. 4, pp. 134, 137 (6 December 1926).

[82] See, e.g., *Islamic Republic of Iran v. United States of America*, Dec. No. 65-A19-FT (30 September 1987), 16 Iran-United States C.T.R. 285, 289-90 (also noting that "[i]t is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*"); *McCollough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone et al.*, Awd. No. 225-89-3 (22 April 1986), 11 Iran-United States C.T.R. 3, 34.

[83] *Awards of Interest*, Decision taken by the Governing Council of the United Nations Compensation Commission at its 31st meeting, held on 18 December 1992, S/AC.26/1992/16 (1993).

practice of States. In the absence of this revision to draft article 44, paragraph 2, the United States believes that article 44 will not reflect the customary law on compensation but would, in fact, be a step backward in the international law on reparation.

Article 45. Satisfa :tion

Mongolia

Mongolia finds the provisions on satisfaction, assurances and guarantees of non-repetition to be highly important.

Paragraph 1

Germany

According to paragraph 1, an injured State is entitled to obtain satisfaction for the damage, in particular moral damage, caused by the internationally wrongful act. The German Government agrees that a State can claim reparation for the moral damage suffered by its nationals. As such, moral damage is equivalent to the harm of mental shock and anguish suffered and reparation will regularly consist of monetary compensation.[84] Since it is actually a form of compensation, not a form of satisfaction, the Commission should consider incorporating it into article 44.

As far as moral damages of States proper are concerned, the situation is less compelling.[85] The German Government would tend to agree that monetary compensation as a form of satisfaction for infringements of the dignity of a State might be justified. However, it would resist any attempt to introduce the notion of "punitive damages" into the realm of State responsibility. Neither State practice nor international jurisprudence would support a punitive function of satisfaction.

United States

Moral damages, as draft article 45 implies, are part of the wrongdoing State's obligation to provide full reparation. The principle may be found in numerous aspects of State practice.[86] The Commentaries state that "international tribunals have always granted

[84] See *Yearbook ... 1993*, vol. II (Part Two), pp. 71, 76.

[85] See *Corfu Channel case, I.C.J. Reports 1949*, p. 36: "The Court ... gives judgment that by reason of the acts of the British Navy in Albanian waters ... the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction." See also *United Nations Secretary-General: Ruling on the Rainbow Warrior Affair between France and New Zealand, International Legal Materials*, vol. XVI, p. 1346 (1987). The ruling does not make clear whether the "compensation" of US$ 7 million awarded covers "moral damages" (which New Zealand had claimed, ibid. at pp. 1353 et seq., but France had rejected for reasons of law, ibid., at pp. 1362 et seq.).

[86] See, e.g., "Determination of ceilings for compensation for mental pain and anguish", decision taken by the Governing Council of the United Nations Compensation Commission during its fourth session, at the 22nd meeting, held on 24 January 1992, S/AC.26/1992/8 ("Decision 8"); Chile-United States Commission, at paras. 23, 31 (awarding moral damages to surviving family members of decedents).

pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties".[87]

Moral damages are equivalent to the harm of mental shock and anguish and consist of monetary payment precisely because they represent a form of compensation for actual harm suffered by a claimant.[88] Yet they are placed within the section on "satisfaction" and appear to be bound by the limitations therein. As stated, draft article 45 runs counter to customary international law. The United States recommends that the Commission resolve this problem by removing moral damages from the rubric of satisfaction and placing them under the provision for compensation in draft article 44. In addition, the draft should clarify that moral damages consist solely of damage for mental pain and anguish.[89] Otherwise, the provision for moral damages will not reflect customary international law and would therefore remain unacceptable.

Paragraph 2

Austria

Although the concept of punitive damages as a legal consequence of violations of international law does not seem to be supported by international State practice, it is nevertheless known in some domestic legal systems. The ILC may therefore study the relevant State practice once again in order to provide a clear picture as to whether paragraph 2 (c) should not be deleted.

From the point of view of Austria, however, the concept contained in paragraph 2 (d) merits further in-depth consideration. The duty of the State responsible for a wrongful act to prosecute individuals responsible for serious misconduct causing the wrongful act as a form of satisfaction should also be studied in order to better reflect recent State practice: there are a growing number of multilateral instruments emphasizing the duty of States to prosecute or extradite individuals for wrongful acts defined in those instruments.

Czech Republic

It would be useful for the Commission to reconsider the question of punitive damages in the case of "crimes", which should be studied in depth. The Commission has taken this question up on several occasions since the first Special Rapporteur, Mr. Garcia Amador, devoted several valuable passages to it in his first report in 1956.[90] The notion of punitive damages is certainly unknown in some national legal systems, but this is not an insurmountable problem when analysing international responsibility, which is *sui generis* in nature as compared with the various regimes of responsibility that exist in domestic law. There are in fact examples in international case law where punitive damages have been claimed by parties and even granted, although it is true that they were relatively exceptional cases; furthermore, it is not as a rule easy to distinguish between real punitive damages, that is, those that go beyond simple reparation, and a "generous" award of compensation

[87] Commentaries, p. 291.

[88] See *Lusitania* cases, p. 15 (holding that an element of wrongful death damages available to claimants is "reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties").

[89] See, e.g., United Nations Compensation Commission decision 8.

[90] A/CN.4/96; see in particular paras. 201-215.

for mental suffering extensively evaluated. Determining the extent to which the underlying reasoning of certain arbitral awards dating fairly far back (e.g. the *Carthage* case of 1913 and the *Lusitania* case of 1923) which specifically excluded the notion of punitive damages remains a pertinent question today and, in the light of the considerable development of international law, surely merits consideration.

Introducing the concept of punitive damages in the draft articles would make it possible to attribute to the regime for "crimes" a valuable a priori deterrent function, and the problems involved, which are certainly real (particularly in the case of crimes such as genocide, for example, which are directed against the population of the perpetrating State itself), do not appear insurmountable. The draft articles already contain a provision (article 45, paragraph 2 (c)) which would seem to accept compensation that corresponds not strictly to the degree or extent of the injury, but to the "gravity" of the infringement of the rights of the injured State, although the commentary does not clearly state whether the Commission had intended to limit it to "crimes" or why it had not. We therefore believe that the Commission could reconsider the question of punitive damages in respect of crimes together with the provision currently set out in article 45, paragraph 2 (c).

France

In the view of France, a new paragraph 2 (a) could be included, referring to acknowledgement of the existence of an internationally wrongful act by a tribunal. Reference could also be made to "an expression of regret" as well as "an apology".

...

France proposes adding a new subparagraph (a) as follows:

"(a) a declaration of the wrongfulness of the act by a competent international body which is independent of the parties;"

France proposes adding the phrase "an expression of regret and" before the phrase "an apology" in subparagraph (a).

Paragraph 2 (d) should refer to "disciplinary or penal action", the term "punishment" being inappropriate.

France proposes replacing the phrase "disciplinary action against" by the phrase "disciplinary or penal action against" in subparagraph (d).

France also proposes deleting the phrase ", or punishment of," in subparagraph (d).

Switzerland

Article 44 governs compensation, i.e., the arrangements for making reparations. Article 45, which deals with satisfaction, another type of reparation, provides in paragraph 2 (c) for the payment of damages – hence compensation – for "gross infringement of the rights of the injured State". The Swiss delegation is inclined to think that article 45, paragraph 2 (c), duplicates article 44 which already governs the issue of compensation. It therefore proposes that paragraph 2 (c) of article 45 be deleted.

United States

The United States objects to paragraph 2 (c) and paragraph 3. Paragraph 2 (c) provides that satisfaction, "in cases of gross infringement of the rights of the injured State, [may take the form of] damages reflecting the gravity of the infringement". This provision suggests a punitive function for satisfaction that is not supported by State practice or international decisions.[91]

Uzbekistan

The following forms of satisfaction should be added in paragraph 2: "an expression of regret", "an expression of special honours to the injured State".

Paragraph 3

United States

A similar concern is the statement in paragraph 3 that satisfaction is limited to the extent that it "would impair the dignity" of the wrongdoing State. The Commentary states that this provision is important to preclude a "powerful State" from "impos[ing] on weaker offenders excuses or humiliating forms of satisfaction incompatible with the dignity of the wrongdoing State and with the principle of equality".[92] However, the term "dignity" is not defined (and may be extremely difficult to define as a legal principle) and therefore the provision would be susceptible to abuse by States seeking to avoid providing any form of satisfaction.[93] The United States urges that article 45, paragraph 3, be deleted.

Article 46. Assurances and guarantees of non-repetition

Czech Republic

The Commission might also wish to review the question of assurances and guarantees of non-repetition, which constitute a potentially critical element of reparation and whose regime should be strengthened in the case of "crimes". In this case, the obligation that has been breached is by definition of essential importance for safeguarding the fundamental interests of the international community; thus the possibility of obtaining appropriate assurances or guarantees of non-repetition from the State committing the "crime" should be, systematically and unconditionally, *de jure*, whereas in the case of "delicts" the securing of such assurances or guarantees would remain subject to an assessment based on the circumstances of the case.

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[91] While some scholars have found that penal sanctions are available in international law (see, e.g., R. Jennings and A. Watts, 1 *Oppenheim's International Law* (9th ed. 1992), vol. 1, p. 533), punitive measures and damages – that is, measures and damages unrelated to obtaining cessation of or reparation for a violation of a State's responsibility – generally are not available to injured States (see, e.g., 8 Whiteman, *Damages in International Law*, p. 1215.

[92] Commentaries, p. 301.

[93] Cf. article 29 of the Vienna Convention on Diplomatic Relations (providing for protection against an attack on the "dignity" of a diplomat); and article 31, paragraph 3, of the Vienna Convention on Consular Relations (providing for protection of consular post's "dignity").

Mongolia

Mongolia finds the provisions on satisfaction, assurances and guarantees of non-repetition to be highly important.

Uzbekistan

Article 46 should stipulate what form of assurances the injured State is entitled to obtain.

Chapter III. Countermeasures

[See also part 1, article 30.]

Austria

Regarding chapter III of part two on countermeasures, more work is still required on further improving the procedures provided for in these draft articles.

Czech Republic

The notion of countermeasures covers various types of measures that an injured State can legitimately take against a State that has committed a wrongful act. As draft articles 47 to 50 show, the Commission tried to avoid any formalization of the current, largely unsatisfactory situation of the law relating to the taking of countermeasures in international relations, seeking instead to formulate clear and precise rules that would reinforce the guarantees against abuses. One indication of the move in this direction is the fact that countermeasures are not considered to constitute a "right" per se of an injured State. They are in fact to be viewed in the context of a situation which excludes the unlawfulness of an act by a State. Coherence has thus been achieved between the provisions of chapter III of part two and article 30 in part one of the draft articles.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries agree with the Commission in considering countermeasures as a reflection of the imperfect structure of present-day international society, which has not (yet) succeeded in establishing an effective centralized system of law enforcement. It is difficult, therefore, to avoid the use of countermeasures which are firmly founded in customary international law. In particular cases the risk of countermeasures may actually be the only effective deterrent to the commission of internationally wrongful acts. This is a reality we have to face, but in order to strengthen the safeguards against possible abuses of countermeasures the aim must be to monitor closely the exercise of that instrumental consequence of an internationally wrongful act.

When the concept of countermeasures is viewed within the perspective of peaceful settlement of disputes, two main conclusions can be drawn: First, there is no room for countermeasures where a mandatory system of dispute settlement exists as between the conflicting parties. Secondly, the use of force is not a legitimate means of enforcing one's own right. In singling out the use of force in the context of countermeasures a line is also drawn between the concept of countermeasures in time of peace as opposed to the applicability of that concept in time of war or, to use the United Nations terminology, during armed conflicts. This distinction further supports the terminology adopted by the Commission which the Nordic countries consider to be a correct one, namely, use of the word "countermeasures" for enforcement acts taken unilaterally by a State in a time of peace while leaving the more value-loaded word "reprisals" for the laws of war, where it already appears in the relevant provisions of the Hague and the Geneva Conventions.

In line with this reasoning, the Nordic countries wish to underline that countermeasures should not be resorted to as a punitive function, but should be seen as a remedy designed to induce the wrongdoing State to resume the path of lawfulness. Even within these parameters, the Nordic countries are of the opinion, however, that an extremely cautious approach must be taken in dealing with the question of countermeasures. It must always be kept in mind that this legal institution favours the powerful countries, which in most instances are the only ones having the means to avail themselves of the use of countermeasures to protect their interests.

France

The problem of countermeasures is raised in part two, chapter III, of the draft articles. France has doubts about mentioning countermeasures in a set of draft articles dealing with the responsibility of States. The regime concerning responsibility should not be integrated with measures other than those aimed at repairing the damage sustained and should therefore not include provisions relating to punishment such as countermeasures, sanctions or collective reactions. In no internal system does responsibility, whether civil or criminal, include methods of enforcement. Such provisions are therefore out of place in a set of draft articles relating to responsibility. While it is true that countermeasures have a reparations dimension, they also have a protective dimension and a punitive dimension. There could, on the other hand, be some justification for a specific study of the regime of countermeasures by the International Law Commission.

In this connection France notes that, in the draft articles, the taking of countermeasures is recognized as legitimate, provided that certain specific conditions are met. France subscribes to this approach.

Germany

The Commission is to be commended for including the topic of countermeasures in part two of its draft and generally striking a careful balance between the rights and interests of injured States and those States finding themselves at the receiving end of such countermeasures. In some respects, however, the draft provisions contained in chapter III of part two establishing substantive as well as procedural safeguards against unjustified or abusive countermeasures would seem to tip the balance in favour of the State that has committed the wrongful act. The overall approach should be to proceed from the assumption

that a State choosing to initiate countermeasures will normally do so in good faith, because it actually seeks redress for an injury which it has suffered or is still suffering.[94]

Ireland

The Commission addresses the subject of countermeasures (reprisals) in draft articles 30 and 47 to 50. Ireland considers it appropriate that this subject be addressed in the context of an examination of State responsibility. We are moreover of the view that this is an area in which it is both desirable and feasible for the Commission not only to clarify the existing rules of customary international law but also to develop the law.

It is a rule of general customary international law that a wronged State is entitled, in response to wrong it has suffered, to take certain measures which would be unlawful but for the prior violation of international law by another State or States. Given the paucity and limited scope of centralized institutions in the international community to deal with wrongdoing by States, we realize that individual States must be allowed to take certain action in such circumstances to protect their interests and accept that this action may extend to the taking of measures which, but for the circumstances, would themselves constitute internationally wrongful acts.

However, in order to minimize the possible abuse of countermeasures, to prevent the escalation of disputes between States and to ensure respect for the rule of law, we regard it as most important that there be limits to the circumstances in which States may resort to countermeasures and to the nature and scope of the measures which may be taken.

Mongolia

Provisions on countermeasures as provided for in chapter III are important for the regime of State responsibility. Conditions and restrictions relating to them seem to have taken into serious account general principles of international law. Mongolia hopes that all relevant questions pertaining to countermeasures will be re-examined in the light of final decisions to be taken on the distinction of international wrongdoing between crimes and delicts since the current system of countermeasures rests on that distinction.

United Kingdom

The United Kingdom Government is concerned that the principles in the draft articles concerning countermeasures may be particularly ill-suited to situations where the dispute is not bilateral. Questions of proportionality, for instance, are much complicated if the initial obligation breached is an obligation *erga omnes*, or in some other way owed to several States. Several States may take countermeasures, but the State principally affected may decide to take none, or even to consent to the breach.

...

The Government of the United Kingdom has noted elsewhere (see articles 30, 48, 50 and 58) that it is not persuaded that it is necessary in these draft articles to say more on the

[94] See Simma, "Counter-measures and dispute settlement: A plea for a different balance", in *European Journal of International Law* (1994), p. 102.

question of countermeasures than is said in draft article 30. The question of countermeasures is complex and might usefully be reserved for separate study, either alone or in conjunction with the study of unilateral acts of States. The United Kingdom Government would much prefer draft articles 47 to 50 to be omitted, and makes the comments presented below in relation to those articles without prejudice to that view.

United States

International law generally permits countermeasures in order to bring about the compliance of a wrongdoing State with its international obligations. The limits on countermeasures are far from clear, though there is general consensus that principles of proportionality and necessity apply. In chapter III, the United States recommends that the Commission: (a) clarify the definition of countermeasures, (b) substantially revise the dispute settlement provisions pertaining to countermeasures, (c) recast the rule of proportionality and (d) delete or substantially revise the prohibitions on countermeasures.

...

The United States agrees that under customary international law an injured State takes countermeasures "in order to induce [the wrongdoing State] to comply with its obligations".[95] In addition, the United States agrees that countermeasures under customary international law are governed by principles of necessity and proportionality. Chapter III as a whole, however, unacceptably limits the use and purposes of countermeasures by imposing restrictions not supported under customary international law.

Article 47. Countermeasures by an injured State

Czech Republic

The Czech Republic has taken note of the fact that articles 47 and 48 were revised following a debate marked by controversy and believes that during the second reading the Commission should review their content very carefully and cautiously.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

Article 47 states in effect that an injured State is entitled to take countermeasures provided demands for cessation/reparation have not been met and subject to the conditions set forth in the following articles. We find that these articles are not easily comprehensible and moreover underline the entitlement of resorting to countermeasures. We believe it would be more logical and in line with a cautious approach to merge articles 47 to 49 into one article under the heading "Conditions of resort to countermeasures". The article could then start out by stating that States are not entitled to resort to countermeasures unless the

[95] See draft article 47, paragraph 1. See also *Case Concerning the Air Services Agreement of March 27, 1946 Between the United States of America and France*, 18 R.I.A.A. 417, 443 (1978) (hereinafter *Air Services* case) (stating that an injured State "is entitled ... to affirm its rights through 'countermeasures'").

following conditions are fulfilled, and then go on to indicate that lawful resort to countermeasures is conditional upon:

(a) The actual existence of an internationally wrongful act;

(b) The prior submission by the injured State of a protest combined with a demand of cessation/reparation;

(c) Refusal of an offer to settle the dispute through amicable settlement procedures, including binding third-party procedures;

(d) Appropriate and timely communication by the injured State of its intention to resort to countermeasures;

(e) Proportionality, i.e., the measures taken by the injured State shall not be out of proportion to the gravity of the internationally wrongful act and the effects thereof.

Paragraph 1

France

Article 47 is something of an amalgam. Paragraph 1 is presented as a definition and seems to have no link with the other two paragraphs, in particular paragraph 3, the substance of which is acceptable but which is hardly appropriate in this article (a State A can obviously not take vengeance on State C for what State B has done to it).

Ireland

Ireland agrees with the view, expressed by the Commission in its report on the work of its forty-eighth session,[96] that countermeasures may not be taken in order to inflict punishment on a wrongdoer State and that the purpose of such measures of self-help is to obtain, as appropriate, the cessation of an internationally wrongful act and/or reparation for the wrong. Ireland moreover believes that the purpose of countermeasures should be so limited and suggests that, for the avoidance of doubt, a sentence along the following lines should be added to paragraph 1, reading:

"It does not include the taking of measures of a punitive nature."

Paragraph 3

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In a separate article it should be stressed that countermeasures are available only against the State that has committed a wrongful act and cannot be taken against third States.

France

See paragraph 1.

[96] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. III.D.2, commentary to article 47, paras. (2)-(4).

Ireland

Ireland is in general agreement with the provisions of draft article 47 regarding the conditions for the taking of lawful countermeasures and the relationship between the lawfulness of a countermeasure and obligations owed to third States. We would nevertheless suggest a slight amendment to paragraph 3. The paragraph deals with the situation where a countermeasure involves a breach of an obligation towards a third State and makes it clear that the breach of an obligation towards a third State cannot be justified on the ground that the conduct concerned constituted a legitimate countermeasure against another State. Since other, international persons and bodies, such as intergovernmental organizations, may be injured by a countermeasure directed at a State, we propose that the term "third State" be replaced by the term "third party" in the paragraph.

Article 48. Conditions relating to resort to countermeasures

Czech Republic

The Czech Republic has taken note of the fact that articles 47 and 48 were revised following a debate marked by controversy and believes that during the second reading the Commission should review their content very carefully and cautiously.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

See article 47.

France

The drafting of article 48 is not satisfactory. France suggests a new formulation as follows:

"1. An injured State which decides to take countermeasures shall, prior to their entry into force:

(a) submit a reasoned request calling upon the State which has committed the act alleged to be internationally wrongful to fulfil its obligations;

(b) notify that State of the nature of the countermeasures it intends to take;

(c) agree to negotiate in good faith with that State.

"2. However, the injured State may, as from the date of such notification, implement provisionally such countermeasures as may be necessary to preserve its rights.

"3. When the internationally wrongful act has ceased, the injured State shall suspend countermeasures, provided that the parties have initiated a binding dispute settlement procedure under which orders binding on the parties may be issued.

"4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour an order emanating from the dispute settlement procedure."

Ireland

Ireland recognizes that the provisions of this article were the subject of much debate and controversy in the Commission and believes that they will likewise prove to be controversial among States. In particular, many States are unlikely to accept any obligation to resort to the dispute settlement provisions of part three of the draft articles, and the Government doubts the wisdom of linking the conditions relating to countermeasures to these provisions. We of course accept that the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered is a basic principle of international law, and that this principle should be reflected in the conditions relating to resort to countermeasures. This means that, before taking countermeasures, a State believing itself to have been injured by an internationally wrongful act on the part of another State should normally negotiate with the wrongdoing State in order to obtain the cessation of the wrongful act and/or appropriate reparation therefore; and only if the wrongful act then continues or appropriate reparation is not forthcoming, could countermeasures be regarded as necessary, thereby entitling the injured State to have resort thereto. We think it unlikely that, in the current decentralized system of international law, States would be willing to undertake any more wide-ranging obligation prior to taking countermeasures.

Also, there are circumstances in which an injured State will want to retain the freedom to resort to countermeasures without prior negotiation, namely, when it regards such action as necessary to preserve its interests. The Commission has dealt with such situations by allowing that an injured State may take interim measures of protection which are necessary to preserve its rights. In the absence of third-party determination of the need for such measures in a particular case, the distinction between interim measures and countermeasures will be difficult to maintain and may indeed merely fuel further disagreement between States.

Switzerland

The Swiss delegation is satisfied with the provisions on the settlement of disputes with respect to countermeasures.

United Kingdom

The United Kingdom Government believes that it is correct in principle, and desirable as a matter of policy, that a State should not resort to countermeasures after a lapse of time which clearly implies that the State has waived its right to do so. They suggest that, if this chapter of the draft articles is to be retained, the International Law Commission should consider the addition of a provision corresponding to article 45 of the Vienna Convention on the Law of Treaties, barring recourse to countermeasures by a State after it has acquiesced in a breach of its rights. Once more, the United Kingdom Government notes that the question of countermeasures in the context of multilateral disputes needs particular attention.

United States

Under customary international law, a demand for cessation or reparation should precede the imposition of countermeasures.[97]

...

Article 48 as a whole should, at the least, be placed in an optional dispute settlement protocol. As a mandatory system of conditions, it is without foundation under customary international law and undermines the ability of States to affirm their rights by countermeasures.

Paragraph 1

Austria

Austria welcomes the fact that the point of view stated in the past by the Austrian delegation to the General Assembly concerning the obligation of the injured State to seek dispute settlement measures prior to taking countermeasures has been reflected in the reformulated article 48, paragraph 1.

See also part three.

Czech Republic

Resort to countermeasures is not a direct and automatic consequence of an internationally wrongful act. It is subject to the identification by the injured State of the behaviour it considers to be wrongful and to the submission of a request for cessation and reparation. Resort to countermeasures is an option only when there has been no satisfactory response to the request addressed to the State committing the violation. The purpose of these preconditions is to reduce the likelihood of premature, and thus improper, resort to countermeasures. It is in this sense that the Czech Republic interprets paragraph 1, which requires the injured State to fulfil its obligation to negotiate prior to taking countermeasures, except in the case of "interim measures of protection", the suspension of which would render the countermeasures meaningless.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The concept of interim measures of protection may also be singled out for special mention.

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[97] See, e.g., *Gabcikovo-Nagymaros case*, op. cit. (footnote 5), at para. 84 ("the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it"); *Air Services Case*, at p. 420. Article 48, however, goes beyond customary international law in two significant respects.

France

France believes that the taking of countermeasures should, as far as possible, be associated with a process for the peaceful settlement of disputes. On this point, the introduction, in paragraph 1, of an obligation to negotiate (provided for in article 54) is appropriate.

Germany

Paragraph 1 stipulates that, prior to taking countermeasures, an injured State must fulfil its "obligation to negotiate" with the State that has committed the wrongful act. The German Government has some doubts as to whether the obligation to negotiate prior to the taking of countermeasures is an accepted principle under international law. It would rather seem that under customary international law only a demand for cessation or reparation must precede the imposition of countermeasures. The International Court of Justice has recently confirmed this principle by stating that "the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make a reparation for it".[98] It would also be quite unreasonable to expect the injured State to refrain from taking (peaceful) countermeasures until it has exhausted all means to settle the dispute amicably. The German Government notes at the same time that paragraph 1 does not prejudice the taking, by the injured State, of "interim measures of protection" necessary to preserve its rights. However, in practice it will be difficult to distinguish interim measures from countermeasures proper. The injured State might resort to what it regards as mere "interim measures of protection" while the target State might consider these responses to constitute full-blown countermeasures, necessitating prior negotiations. Concern has already been voiced that the new category of "interim measures" may open the way to attempts to circumvent the limitations traditionally attached to the taking of reprisals.

United Kingdom

As explained below, the United Kingdom has reached the conclusion that the whole of part three, concerning dispute settlement, should be omitted. This has nothing to do with the United Kingdom's general attitude towards the compulsory third-party settlement of legal disputes, to which the Government remains as firmly attached as ever. It has to do instead with the effect part three is likely to have in inhibiting widespread acceptance of the draft articles among States. Nowhere is this clearer than in the manner in which the draft links the provisions on dispute settlement to those on countermeasures. Customary international law does not require that States negotiate prior to taking countermeasures, or even that States abandon countermeasures while negotiations are in process. Paragraph 1 proposes a novel and unjustified restraint upon States which is impractical and utopian in the fast-moving modern world. The United Kingdom Government also considers that the reference to "interim measures of protection" is an unfortunate use of language which may suggest a conceptual link, which it considers entirely misconceived, with interim measures in the International Court of Justice.

[98] *Case concerning the Gabcikovo-Nagymaros project* (Hungary vs. Slovakia), 25 September 1997, para. 84

United States

Article 48, in conjunction with draft article 54, requires an injured State to seek negotiations before taking countermeasures. However, customary international law does not require an injured State to seek negotiations prior to taking countermeasures, nor does it prohibit the taking of countermeasures during negotiations. The *Air Services Case* tribunal, for instance, noted that it "does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations ..."[99] The requirement for prior negotiations may prejudice an injured State's position by enabling a wrongdoing State to compel negotiations that delay the imposition of countermeasures and permit it to avoid its international responsibility.

The draft, in article 48, paragraph 1, treats this problem by providing an exception from the prior-negotiation requirement for "interim measures of protection which are necessary to preserve [the injured State's] rights". This exception is vague and may lead to contradictory conclusions by States seeking to apply it. In particular, the draft does not indicate whether interim measures of protection would, like countermeasures, be unlawful absent the precipitating wrongful act. If not, then it would be unnecessary to enunciate a principle of interim measures. However, if interim measures fall within the definition of draft article 30 but short of "full-scale countermeasures",[100] it is unclear how in concrete circumstances the term might be applied.[101]

Rather than opening the section on countermeasures to disputes over the meaning of interim measures, the draft should reflect the fundamental customary rule that countermeasures are permissible prior to and during negotiations. We would therefore urge the Commission to clarify draft article 48 by stating that countermeasures are permissible as a means to induce such compliance prior to and during negotiations.[102]

Paragraph 2

Czech Republic

The fulfilment by the injured State, when it takes countermeasures, of its obligations in relation to dispute settlement in accordance with part three of the draft articles or any other binding dispute settlement procedure in force between the States concerned introduces a relatively rigid organic link between parts two and three of the draft. While the Czech Republic is not unsympathetic to the idea of monitoring, at least *a posteriori*, the lawfulness of countermeasures, the obligation set out in draft article 48, paragraph 2, would seem to prejudge the question of the binding nature of part three concerning the system for the settlement of disputes. Thus any problems which States may have with the dispute settlement regime proposed in part three have direct consequences for the substantive rules concerning countermeasures.

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[99] *Air Services Case*, at p. 445.

[100] Commentaries, p. 311.

[101] The Commentaries cite measures such as freezing assets to preclude capital flight and measures that "have to be taken immediately or they are likely to be impossible to take at all" (p. 312). Such examples are useful illustrations but provide limited guidance.

[102] The Commentaries might note that an injured State should, where possible, seek to obtain a wrongdoing State's compliance with its international obligations by negotiations.

United States

Paragraph 2 contains two flaws with respect to the draft's system of arbitration. First, it states that "an injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three ...". This refers to draft article 58, paragraph 2, which states that where the dispute involves the taking of countermeasures by the injured State, "the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal" constituted under the articles. Compulsory arbitration of this sort is not supported by customary international law, would be unworkable in practice and would establish a novel system whereby an injured State may be compelled to arbitrate a dispute. There is no basis in international law or policy for subjecting the injured State to such a requirement when it pursues countermeasures in response to a wrongful act of another State. Indeed, this compulsory system is in contrast to draft article 58, paragraph 1, which states that the parties may submit other disputes under the articles to arbitration "by agreement". We think that this creates a serious imbalance in the treatment of injured and wrongdoing States. In addition to extending the period during which a wrongdoing State may remain in breach of its obligations, this system imposes on the injured State the high cost of arbitrating the dispute. Draft article 60 exacerbates the problem of delay by providing for ICJ review. We believe that this system of compulsory arbitration would impose an unacceptable cost on injured States that must resort to countermeasures.

In addition, draft article 48, paragraph 2, states that "an injured State taking countermeasures shall fulfil" the obligations under article 58, paragraph 2, "or any other binding dispute settlement procedure in force" for the parties. We understand that article 48, paragraph 2, merely seeks to preserve other existing mechanisms in force between the parties.[103] However, to the extent that it may be read as imposing additional requirements, the paragraph lacks support under customary international law. For instance, it should not be misinterpreted as constituting consent to resort to dispute settlement procedures where the existing procedure requires mutual consent. Such an outcome would be unacceptable.

Paragraph 3

United States

Paragraph 3's requirement that countermeasures be suspended while dispute settlement mechanisms are "being implemented in good faith" is vague and may lead to further delay and abuse by the wrongdoing State.

Article 49. Proportionality

Austria

Based on the rather "realistic" approach advocated by Austria in the context of codification, the element of proportionality seems to be of crucial importance. Austria recognizes, of course, that the principle of proportionality remains undetermined in its scope as long as no international judicial authority exists which could further develop and refine the concept of proportionality. On the other hand, it cannot be denied that the mere fact that

[103] See Commentaries, pp. 312-313.

the element of proportionality may be invoked by a State against which countermeasures are taken already provides a regulating effect. Furthermore, the jurisdiction of the International Court of Justice, particularly its advisory opinion on the legality of nuclear weapons and the reference to the principle of proportionality therein, reveals the importance of this principle as a regulatory element in already existing State practice.

Some of the work of the ILC should therefore be devoted to possibly further refining the provision on proportionality at least for the commentary to be provided by the Commission for the conclusive set of draft articles.

Czech Republic

The proportionality of countermeasures, provided for in article 49, is one of the fundamental conditions to be met if the resort to countermeasures is to be legitimate. The function of the principle of proportionality becomes even more important in the case of countermeasures taken in response to a crime. The effects of a crime may be felt by the community of States to varying degrees, and the principle of proportionality should therefore be applied by each injured State individually; this is in fact what article 49 in its current form does.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

See article 47.

France

France proposes replacing the phrase "out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State" by the phrase "out of proportion to the effects of the internationally wrongful act on the injured State and the degree of gravity thereof".

Germany

As far as the issue of proportionality is concerned, the German Government agrees that it constitutes a principle widely recognized in both doctrine and jurisprudence. It has recently been affirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[104] The German Government would also agree that an assessment of proportionality has to involve consideration of all elements deemed to be relevant in the specific circumstances. This evaluation will also have to include the gravity of the alleged breach involved.

[104] Advisory Opinion of 8 July 1996, paras. 41 et seq. The full text of the advisory opinion is contained in the annex to United Nations document A/51/218.

Ireland

Ireland agrees with the Commission that proportionality is accepted in general customary international law as a prerequisite of the legitimacy of a countermeasure and also agrees with the negative formulation of this condition in draft article 49. We wonder whether further thought might not however fruitfully be given by the Commission to the phrasing of the condition. There has in recent years been an in-depth examination and application of this criterion to specific situations by international bodies, for example, by international human rights institutions such as the European Court of Human Rights, and it may be that, in the light of this practice, a more refined description of the text would be possible. The current phrasing of draft article 49 might suggest that the only considerations of relevance in applying the criterion of proportionality to countermeasures are the degree of gravity of the internationally wrongful act and the effects thereof on the injured State. We note in this connection that, in its report on the work of its forty-seventh session, the Commission states that the purpose of countermeasures, namely, to induce the wrongdoing State to comply with its obligations, is of relevance in deciding whether and to what extent a countermeasure is lawful, and perceives "this issue" as being different from that of proportionality.[105] The Commission appears thereby to imply that the purpose of countermeasures is not relevant in considering the proportionality of a countermeasure. Yet, as international case law in the field of human rights demonstrates, the purpose of a measure may be a relevant consideration in deciding the proportionality of the measure. Countermeasures may legitimately be taken in order to secure the cessation of an internationally wrongful act and/or to obtain reparation therefor, and reparation itself may take a number of forms. We are of the view that both the particular aim of the countermeasure and the particular form of reparation sought, if any, may indeed be relevant to the question of the proportionality of a countermeasure.

We further note that, at the same point in its report on the work of its forty-seventh session, the Commission indicates that the concluding phrase "on the injured State" (in relation to the effects of the internationally wrongful act) is not intended to narrow the scope of draft article 49 and unduly restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, for example, violations of human rights. The Commission however then goes on to distinguish between a material injury and a legal injury, and states that a legally injured State, in contrast to a materially injured State, would be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.[106] Since in many instances of human rights violations the material injury will be to nationals of the State committing the internationally wrongful act, it may be that limitation of consideration of the effects of an internationally wrongful act to the legal injury suffered by an injured State would be too restrictive. Indeed it may be that, in such cases of human rights violations, the classic understanding of proportionality in the context of countermeasures as a relationship between a wrongdoing and a wronged State may be inappropriate.

[105] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), chap. IV.C, para. (10) of the commentary to article 13.

[106] Ibid., para. (9).

United States

The United States agrees with the Commission that under customary international law a rule of proportionality applies to the exercise of countermeasures.[107] International law does not, however, provide clear guidance with respect to how States and tribunals should measure proportionality. One school of thought states that the countermeasure must be related to the degree of inducement necessary to satisfy the original debt,[108] or "the amount of compulsion necessary to get reparation".[109] Elsewhere, it is stated that the countermeasure must be compared "to the act motivating them".[110] We agree that, in some circumstances, the countermeasure must be related to the principle implicated by the international wrong.[111] Similarly, the wrongful act may illustrate what kind of measure might be effective to bring the wrongdoing State into compliance with its obligations.

Draft article 49 evaluates the proportionality of a countermeasure by accounting for "the degree of gravity of the internationally wrongful act and the effects thereof on the injured State".[112] We believe that this formulation gives undue emphasis to the "gravity" of the antecedent violation as the measure of proportionality. In the view of the United States, draft article 49 should reflect both trends identified above with respect to proportionality. Proportionality means principally that countermeasures should be tailored to induce the wrongdoer to meet its obligations under international law, and that steps taken towards that end should not escalate but rather serve to resolve the dispute. A conception of proportionality that focuses on a vague concept of "gravity" of the wrongful act reflects only one aspect of customary international law. As Professor Zoller has written, proportionality is not confined to relating the breach to the countermeasure but rather to "put into relationship the purpose aimed at, return of the status quo ante, and the devices

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[107] See e.g., Memorial and reply of the United States in the *Air Services Case*, excerpted in M. Nash, *1978 Digest of United States Practice in International Law*, pp. 768 and 776.

[108] R. Phillimore, *Commentaries upon International Law*, vol. 3, p. 16 (1985).

[109] H. Lauterpacht, *Oppenheim's International Law*, vol. 2, p. 141 (1952). See Commentaries, pp. 316-317, footnotes 130 and 132.

[110] *Naulilaa Case*, United Nations Reports of International Arbitral Awards, pp. 1011 and 1028 *(Portugal v. Germany)* (1928). See also *Air Services Case*, p. 443 (the countermeasure requires "some degree of equivalence with the alleged breach").

[111] The *Air Services* Tribunal stated: "The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the countermeasures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France." *Air Services Case*, pp. 443-444. Such an examination of the State responsibility violation differs from that suggested by the use of the term "gravity" in draft article 49.

[112] The draft's concept of effects on an injured State is not entirely clear and thus requires elucidation. It does not, for example, appear to match the ICJ's recent enunciation of an effects measurement, which related the effects of the countermeasure to the injury. See *Hungary/Slovakia case*, op. cit. (footnote 5), para. 85 ("an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question"). Draft article 49, by contrast, relates the countermeasure to the effects of the wrongful act on the injured State. See Commentaries, p. 321. The Court did not elucidate this "effects" consideration, and its analysis does not clearly indicate which trend in the law it intended to follow.

resorted to in order to bring about that return".[113] Because countermeasures are principally exercised to bring a return to the status quo ante, a rule of proportionality should weigh the aims served by the countermeasure in addition to the importance of the principle implicated by the antecedent wrongful act.

In addition, the Commentaries, at page 319, explain article 49's formulation, "shall not be out of proportion", by stating that "a countermeasure which is *disproportionate, no matter what the extent*, should be prohibited to avoid giving the injured State a degree of leeway that might lead to abuse" (emphasis added). The United States believes that this interpretation does not accord with customary practice.[114] Proportionality is a matter of approximation, not precision, and requires neither identity nor exact equivalency in judging the lawfulness of a countermeasure. Customary law recognizes that, in some circumstances, a degree of response greater than the precipitating wrong may be appropriate to bring the wrongdoing State into compliance with its obligations.[115] The United States believes this interpretation should be reflected in the text of draft article 49.

Article 50. Prohibited countermeasures

Czech Republic

Article 50 concerns prohibited countermeasures. The Czech Republic is in agreement with the prohibitions listed in subparagraphs (a) to (e), most of which relate to *jus cogens*.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In a second article one could then deal with prohibited measures along the lines of article 50 proposed by the ILC.

Ireland

Ireland strongly endorses the itemization in draft article 50 of substantive limits to the measures which may lawfully be taken by way of countermeasures. In the last few decades there has been increasing recognition that there is conduct on the part of a State which should be prohibited under all circumstances and which logically therefore should not be permitted even in response to a prior unlawful act of another State. We welcome the

[113] Zoller, op. cit. (footnote 52), p. 135. See also Elgab, op. cit. (footnote 50), p. 45. Cf. Commentaries, p. 319.

Relating the countermeasure to the aims to be achieved, whether cessation or reparation, differs from the requirement of draft article 47, para. 1, that the countermeasure be necessary. The requirement of necessity aims at the initial decision to resort to countermeasures; it asks, is the resort to countermeasures necessary? See Commentaries, p. 307. By contrast, the rule of proportionality asks whether the precise measure chosen by the injured State is necessary to induce the wrongdoing State to meet its obligations.

[114] See, e.g., *Naulilaa Case*, p. 1028 (countermeasures are "excessive" where they "are out of all proportion to the act motivating them"); *Air Services Case*, p. 444 (measures taken by the United States "d[id] not appear to be *clearly disproportionate*").

[115] As one writer has put it, the cases and practice of States suggests that the appropriate measure is, roughly speaking, whether the countermeasure is "too severe". See Alland, op. cit. (footnote 50), p. 184.

attempt by the Commission to set forth the recognized limits to legitimate countermeasures and to build thereon, and in general support the list of prohibited conduct. However we do not agree fully with all aspects of the list, and we address each of the categories of prohibited conduct in turn, below.

United Kingdom

The limitations which draft article 50 sets upon lawful countermeasures are not satisfactory.

United States

The United States believes that article 50's prohibitions on the resort to countermeasures do not in all cases reflect customary international law and may serve to magnify rather than resolve disputes. First, the draft article would prohibit categories of countermeasures without regard to the precipitating wrongful act. However, article 49's rule of proportionality generally would limit the range of permissible countermeasures and would, in most circumstances, preclude resort to the measures enumerated in article 50. To that extent, draft article 50 is unnecessary. Second, the draft article may add layers of substantive rules to existing regimes without clarifying either the specific rules or the law of State responsibility. Thus, the duplication of rules in areas such as diplomatic and consular relations and human rights may complicate disputes rather than facilitate their resolution.[116]

Subparagraph (a)

France

The drafting of subparagraph (a) is strange. It would be better to draw on the drafting of article 52 of the 1969 Vienna Convention on the Law of Treaties. The new wording could then read as follows: "the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".

Ireland

The inclusion in subparagraph (a) of the threat or use of force as prohibited by the Charter of the United Nations reflects the concern of States that disputes should be settled peacefully, without resort to force, and implicitly recognizes the role of the United Nations

[116] For instance, the rules of diplomatic and consular relations set forth in the two Vienna Conventions – Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, 18 April 1961, United Nations *Treaty Series*, vol. 500, p. 95, United States, *Treaties and International Agreements Series*, No. 7,502; Vienna Convention on Consular Relations and Optional Protocol on Disputes, 24 April 1963, United Nations *Treaty Series*, vol. 596, p. 261, United States, *Treaties and International Agreements Series*, No. 6,820 – establish a system of reciprocity, under which a State that violates its provisions legitimately may be subject to a proportionate denial of reciprocal rights. While we strongly support the principle of inviolability, draft article 50, subparagraph (c), should not be misinterpreted to preclude actions taken on the basis of reciprocity. See Vienna Convention on Diplomatic Relations, article 47, para. 2; Vienna Convention on Consular Relations, article 72, para. 2.

and its organs in this area. Ireland believes that, other than in self-defence or collective enforcement action under the Charter of the United Nations, force should not be used or threatened by one State against another and fully agrees with the limitation on countermeasures specified in this subparagraph. We also note in this connection that it is stated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, contained in General Assembly resolution 2625 (XXV), adopted by consensus on 24 October 1970, that States have a duty to refrain from acts of reprisal involving the use of force.

Subparagraph (b)

France

Subparagraph (b) also poses a problem. This is a new provision which has no basis in customary law, and should thus be deleted.

Ireland

The Commission argues that the proposed limitation set forth in subparagraph (b), namely, extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act, is also currently prohibited under international law in all circumstances, and indeed there is some evidence in State practice for this.[116a] We nevertheless doubt whether there would be universal agreement that such conduct is prohibited in *all circumstances* and therefore approach the matter as a proposal *de lege ferenda*. We note that two essential State interests would be protected by the prohibition, those of the territorial integrity and political independence of the wrongdoing State. We also note that the prohibition would not extend to all economic or political pressure which threatened those interests but only to extreme economic or political coercion. The formulation seems intended to draw a balance between the legitimate interests of a State entitled to take countermeasures and the vital interests of a wrongdoing State. While the epithet "extreme" is not precise and may give rise to disagreement in a specific instance of economic or political coercion used by way of a countermeasure, we are of the view that some such limitation on the taking of countermeasures is desirable and that the formulation has merit. Indeed consideration might fruitfully be given by the Commission to the extension of this prohibition to cover the vital interests of the population of a wrongdoing State as opposed to the vital interests of the State itself. We have in mind countermeasures which would, for example, have the effect of depriving the people of a State of their means of subsistence.

Switzerland

The provisions on countermeasures are on the whole a balanced and particularly well drafted section of the Commission's draft. Nevertheless, Switzerland has a reservation with regard to subparagraph (b), which prohibits as a countermeasure "extreme economic or political coercion designed to endanger the territorial integrity or political independence

[116] [a] See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), chap. IV C, paras. (8)-(11) of the commentaries to article 14.

of the State which has committed the internationally wrongful act". One wonders why this prohibition is restricted to economic and political coercion. Surely there are other types of coercion, for example environmental countermeasures, which could also endanger the territorial integrity and political independence of a State. For that reason, Switzerland would like to see the words "economic and political" deleted from subparagraph (b).

United Kingdom

The notion of countermeasures involving "extreme economic or political coercion", which subparagraph (b) seeks to prohibit, is vague and altogether too subjective. The wording lacks precision, but there is in any case no obvious way in which a definition of "extreme" measures might be approached. Furthermore, if the original wrong were the application of "extreme economic or political coercion" to the injured State, it is hard to see why that State should not respond in kind against the wrongdoing State.

United States

Thirdly, the article relies on vague language that would amplify the areas of dispute. For instance, subparagraph (b) disallows the use of "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". What is "extreme"? What measures fall under the rubric of "economic or political coercion"? What kinds of economic or political measures would "endanger the territorial integrity or political independence" of a State?[117] These are subjectively adduced criteria for which no supporting State practice is cited.[118]

Subparagraph (c)

Ireland

Ireland likewise approaches subparagraph (c) as a proposal *de lege ferenda*. There is universal acceptance of the inviolability of diplomatic and consular agents, premises, archives and documents but some doubt as to the existence of this inviolability in respect of each of the categories of the protected persons and property *in all circumstances*. We regard the inviolability of these persons and property as fundamental to the operation of the international legal system and support this limitation on recourse to countermeasures. There are other measures which may lawfully be taken as a response to an internationally wrongful act in relation to diplomatic and consular personnel and property and which would not be as deleterious to the functioning of the international legal system, for example, a rupture of the diplomatic relations between the wronged and the wrongdoing State.

[117] Cf. Elgab, op. cit. (footnote 50), pp. 191-196.

[118] Indeed, of the cases that are cited, the economic measures would seem to be lawful even in the absence of the precipitating wrongful act. See Commentaries, p. 330.

Subparagraph (d)

Ireland

Ireland also agrees with the general thrust of the limitation specified in subparagraph (d), that is, any conduct which derogates from basic human rights, but regards the phrase "basic human rights" as too general and imprecise for this purpose. It is possible to identify certain such rights from which no derogation is permissible, and we consider it desirable that these be specified in draft article 50.

It is now usual to provide in international agreements guaranteeing civil and political rights that there may be no derogation from a number of these rights even in time of war or other public emergency threatening the life of the nation. While there is some variation in the list of non-derogable rights in the various treaties, there is a large degree of concordance among them. We would suggest that the list enumerated in the International Covenant on Civil and Political Rights[119] is appropriate for inclusion in draft article 50 since the Covenant is intended to constitute part of a worldwide bill of rights and is in fact now widely subscribed to by States.

Paragraph 2 of article 4 of the International Covenant on Civil and Political Rights provides as follows:

> "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

Article 6 guarantees the right to life; article 7 the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; paragraph 1 of article 8 the right not to be held in slavery; paragraph 2 of article 8 the right not to be held in servitude; article 11 the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; article 15 the right not to be subjected to retroactive criminal offences or penalties; article 16 the right to recognition everywhere as a person before the law; and article 18 the right to freedom of thought, conscience and religion.

Paragraph 1 of article 4 permits derogation from the other rights guaranteed by the Covenant in time of public emergency, but only to a certain extent and subject to certain conditions. It states:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Clearly, therefore, not only may there be no derogation from the rights specified in paragraph 2, but derogation of a discriminatory kind from any of the protected rights is also prohibited. The Government of Ireland would accordingly recommend that countermeasures involving a derogation from any of the rights specified in paragraph 2 of article 4 of the International Covenant on Civil and Political Rights as well as countermeasures which are discriminatory on any of the grounds mentioned in paragraph 1 of article 4 should be expressly prohibited.

[119] See General Assembly resolution 2200 (XXI), annex.

United Kingdom

Again, the prohibition subparagraph (d) seeks to set on countermeasures that would "derogate from basic human rights" strikes a sympathetic chord but is, all the same, difficult to grasp and unacceptably wide. Principles such as the sanctity of human life and freedom from slavery or torture are of course fundamental, and their preservation has the United Kingdom's firm support. The fact remains, however, that most countermeasures are not directed at individuals, but are measures taken by one State against another State. It is therefore far from clear how any recognizable countermeasure in the understood sense of the term could amount to "conduct which derogates from" fundamental rights of this kind. Whether the same would be true of other generally recognized human rights, such as freedom of association, is not immediately apparent; nor is it apparent whether they would or would not be within the proposition in the draft article. The United Kingdom notes, moreover, that the Commentary on subparagraph (d) cites as an illustration of the proposition the exclusion from asset freezes and trade embargoes of items necessary for basic subsistence and humanitarian purposes. This is however a subject of some current controversy which is under discussion in the Security Council and General Assembly within the framework of Article 50 of Charter of the United Nations.

The questions raised above with respect to subparagraphs (b) and (d) are thus issues of substantive law. They reinforce the United Kingdom's belief that the draft articles should confine themselves to the generally applicable principles of State responsibility and should not attempt detailed regulation of the rules governing countermeasures.

United States

Similarly, subparagraph (d) refers to "any conduct which derogates from basic human rights", without defining derogation or "basic" human rights. The language of subparagraph (d) provides only limited guidance, for there are very few areas of consensus, if any, as to what constitutes "basic human rights".

Subparagraph (e)

France

For the reasons of principle stated above, the references to *jus cogens* in ... article 50, subparagraph (e), should be deleted.

...

France cannot agree to subparagraph (e), which refers to the concept of a "peremptory norm of general international law".

See also article 19, paragraph 2.

Ireland

With reference to paragraph (e), which prohibits by way of countermeasures any other conduct in contravention of a peremptory norm of general international law, we favour the deletion of this provision. While there is widespread acceptance of the concept of a peremptory norm of general international law, there is not the same degree of consensus

with respect to the identification and formulation of specific norms. Moreover, as we have indicated in relation to the other subparagraphs of the draft article, we prefer as much specification as is reasonably possible with respect to State conduct which is prohibited by way of countermeasures.

United States of America

Subparagraph (e) similarly does not provide useful guidance in determining whether a countermeasure would be permissible. Just as there is little agreement with respect to "basic" human rights and political and economic "coercion", the content of peremptory norms is difficult to determine outside the areas of genocide, slavery and torture.

Proposal for new article 50 *bis*

France

Should chapter III on countermeasures be retained, France proposes an article 50 *bis* on the cessation of countermeasures. It is important to emphasize the essentially conditional and provisional nature of countermeasures.

France proposes adding a new provision on the cessation of countermeasures as follows:

> "Countermeasures shall cease as soon as the obligations breached have been performed and full reparation has been obtained by the injured State."

Chapter IV. International crimes

[See also part I, article 19]

Czech Republic

The use of terms is not a key issue, however. The real issue before the Commission is whether there are in fact two different types of wrongful acts and, if so, what are the specific consequences of an internationally wrongful act that harms the fundamental interests of the international community as a whole. The purpose of the draft articles on State responsibility is to lay down secondary rules called for by breaches of primary rules. However, the difficulties that arise from a consideration of the consequences of international crimes are in large part directly linked to the ambiguities surrounding primary rules, whose clarification is not within the Commission's mandate ...

The characterization of crimes set out in article 19 would appear to suggest that it is first of all the nature of the primary rule that determines which breaches constitute crimes. Consequently, that article further strengthens the impression that the definition of crimes falls within the domain of the codification of primary rules. However, there is a widely held view that whether a breach of a rule of international law falls under a specific responsibility regime – in other words, whether such a breach has aggravated consequences – depends not so much on the nature of the primary rule as on the scale of the breach and on the extent of its negative consequences. Accordingly, this latter approach – unlike the Commission's

approach, which the Czech Republic endorses, and which is based on a quite rigorous distinction between delicts and crimes – treats the transition between the two categories as a sort of "continuum", with all the drawbacks to which that would give rise when secondary rules are laid down and implemented.

To acknowledge, where responsibility is concerned, that wrongful acts that jeopardize the fundamental interests of the international community – whatever terms may be used to refer to such acts – do not have specific consequences when compared with other wrongful acts, or to acknowledge that it is not possible to determine objectively and on the basis of a legal rule what such consequences are, would be tantamount to acknowledging that "fundamental interests of the international community" is not a legal but a political concept, whose interpretation is open to the influence of such factors as expediency and arbitrariness.

The distinction between the two categories of internationally wrongful acts – whatever terms may be used in order to refer to them – is based on the assumption that there is a difference between the responsibility regimes for the two categories of wrongful acts (such a distinction would otherwise serve no practical purpose and be superfluous). One might well at first believe that the differences between the two responsibility regimes have gradually disappeared – among other things, as a result of the abandonment of former article 19 in part two, which dealt with a specific institutional mechanism for applying the principle of responsibility for a "crime". The Czech Republic does not endorse such a view, however. Firstly, it is sensible not to adopt approaches that are rather impractical and overambitious, among which the institutional mechanism just mentioned and other such initiatives should no doubt now be included. In the longer term, a viable regime of responsibility for crimes can no doubt ideally not be conceived of without developing an appropriate implementation mechanism. Given the aggravated character of the substantive consequences of crimes, a collective response transmitted through an ad hoc or permanent mechanism at the disposal of the international community should be given preference over the use of countermeasures by individual States. However, in the current circumstances it is unrealistic to entrust international organizations with taking all the necessary decisions and action in order to put into effect the legal consequences of crimes. The process of setting up the appropriate mechanisms will probably be slow, and ways of institutionalizing international action can vary widely. It is therefore too early to make specific proposals in that respect during the current exercise.

Denmark on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

As to the chapter dealing with the consequences of an international crime, the approach was not very ambitious; it may, however, be the more realistic one. As stated in the Commentary, the formulation of articles 41 to 45 dealing with reparation as well as article 46 is for the most part adequate to respond to the most serious as well as lesser breaches of international law. The Nordic countries agree with that assessment in particular if it is generally accepted that the phrase contained in article 45, on satisfaction, "in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement", also covers punitive or exemplary damages.

France

The whole of chapter IV, on "international crimes", is the object of a reservation in principle by France taking into account its position on article 19.

Germany

The position of the German Government on the issue of international crimes has been consistent over the past 20 years. This position has been, and still is, one of considerable scepticism regarding the usefulness of the concept. The German Government would, once again, urge the Commission to reconsider the concept with due consideration to State practice.

The idea that States themselves are to be held criminally responsible is not sustained by international practice. Since Nürnberg, considerable developments have taken place in the field of individual criminal responsibility. The principle of individual criminal responsibility, including that of State officials, has been embodied in a number of international conventions and forms the basis for the International Tribunals for the Former Yugoslavia and for Rwanda, the draft Code of Crimes against the Peace and Security of Mankind prepared by the Commission and the current negotiations on a statute for an international criminal court. It has been submitted that upholding the notion of "crime" in the context of the conduct of States as abstract entities will adversely affect the developments in the field of criminal responsibility of individuals.[120] Indeed, it has always been a line of defence by individual criminals to negate their own responsibility and to blame the criminal system which they served.

It is difficult to reconcile the principle of equality of States with the possibility of one State punishing another State for acts or omissions it considers to be of a criminal nature. However, existing international institutions and legal regimes already provide rules and mechanisms for a collective response to violations of international obligations that would fall under the ambit of article 19, paragraph 2. For cases of aggression there exists the Charter system for the maintenance of international peace and security, particularly Chapter VII, and the law on collective self-defence (to which, in any case, the draft articles are subordinated). Flagrant violations of the right of self-determination will again constitute issues falling under Chapter VII and will, additionally, be governed by relevant rules and principles within international organizations at both the universal and the regional levels. Serious breaches, on a widespread scale, of international obligations that are of essential importance for safeguarding the human being might well be, and indeed have been, taken up by the Security Council as "threats to international peace and security".[121] The same applies to intentional acts of severe environmental degradation.[122] Perhaps in contrast to the situation existing at the time when the concept of "State crimes" was first introduced,[123]

[120] See Rosenstock, "An international criminal responsibility of States?", in *International Law on the Eve of the Twenty-first Century* (1997), p. 267.

[121] See Security Council resolutions 770 (1992), 808 (1993) and 827 (1993) (situation in the former Yugoslavia); Council resolutions 918 (1994) and 955 (1994) (situation in Rwanda); Council resolution 1080 (1996) (situation in the Great Lakes region).

[122] See Security Council resolution 687 (1991), para. 16 (holding Iraq responsible for "damage – including environmental damage and the depletion of natural resources").

[123] See Rosenstock, op. cit. (footnote 121), p. 275: "Article 19 is a reflection of the political climate and mood of the 1960s and 1970s and little more".

universally condemned acts can now be expected to find their adequate legal and political response by the community of States.

The German Government readily accepts that there exists a category of "wrongful acts of an exceptional gravity", to take up a term proposed by members of the International Law Commission,[124] that is breaches of obligations which protect values or goods of concern to all States. There is ample evidence that the concepts of obligations *erga omnes* and, even stronger, *jus cogens* have a solid basis in international law. Reference needs only to be made to the *Barcelona Traction Case*[125] and to the Vienna Convention on the Law of Treaties.[126] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice pointed out that "because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' ... *they constitute intransgressible principles of international customary law*" (emphasis added).[127] With the Court, one can safely say that it is generally accepted that rules and principles protecting the basic interests of the international community should enjoy a legal strength enabling them to override any attempt, in fact or in law, to harm those interests.

The German Government would encourage the Commission to re-evaluate the importance of the concepts of obligations *erga omnes* and of *jus cogens* in the field of State responsibility. If the Commission uses as a starting point the idea that violations of peremptory norms of international law (*jus cogens*) lead to *erga omnes* obligations, it could very well succeed in drafting provisions that are acceptable to the international community as a whole. In carrying out such a review, the emphasis should be less on introducing remedies of punitive character than on how States should react to grave breaches either *ut singuli* or acting collectively.

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[124] See *Yearbook ... 1994*, vol. I, pp. 69 et seq. and 81 et seq. In a footnote to the word "crime" the first time it appears in part two of the draft articles, the Commission at its forty-eighth session in 1996 stated the following: "The term 'crime' is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as 'an internationally wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime' thus, *inter alia*, avoiding the penal implication of the term" (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 141, unnumbered footnote. The German Government would certainly support such a move.

[125] *Barcelona Traction, Light and Power Company Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32.

[126] United Nations, *Treaty Series*, vol. 1155, p. 331. Article 53 reads as follows:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The International Court of Justice mentioned the concept of *jus cogens* in its judgment in the *North Sea Continental Shelf Cases* (*I.C.J. Reports 1969*, p. 42) and, in its judgment in the *Nicaragua* case (Merits), quoted with approval the following statement by the International Law Commission: "[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (*I.C.J. Reports 1986*, p. 100, para. 190).

[127] Advisory Opinion of 8 July 1996, para. 79. The full text of the advisory opinion is contained in the annex to United Nations document A/51/218.

United Kingdom

The legal consequences of the designation of an international wrongful act as an international crime appear to the Government of the United Kingdom to be of little practical significance and, to the extent that they do have significance, to be unworkable. Those consequences are established by draft articles 51 to 53.

...

The opposition of the United Kingdom Government to the concept of international crimes was explained above.

Article 51. Consequences of an international crime

Austria

Austria still prefers that article 19 be deleted together with its legal consequences which are dealt with in articles 51 to 53.

See also article 19.

Czech Republic

The Czech Republic is disappointed with the Commission's extremely terse commentary on the articles contained in part two, chapter IV, and the absence of any reference to specific features of the application to international crimes of the articles contained in part two, chapters II and III. This absence is particularly striking given that article 51 specifically states that "an international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53." The Commentary to the articles contained in chapters II and III gives the impression that there may be nothing special about the way they are to be applied in the case of international crimes, whereas the magnitude of the injury done by an international crime and the fact that there are many injured States mean that the application of a single provision from chapters II and III to both a delict and a crime would occur under very different circumstances and could result in significantly different outcomes.

Lastly, and this is moving in the direction of the second question on which the International Law Commission is especially keen to have the views of Governments, namely the issue of countermeasures, the Czech Republic does not believe that the regime of countermeasures in the cases of State "crimes" should be individualized, i.e., liberalized. The notion of countermeasures has come to take the place of the traditional notion of "reprisals", which has undergone a fundamental change since the appearance in international law of the prohibition of the use of force, which has been set up as a peremptory rule (*jus cogens*) and incorporated in the Charter of the United Nations. The Czech Republic considers that, given the rudimentary nature of the centralized machinery for the application of international law, individual means of constraint or coercion continue to be an indispensable element of that law, and the provisions governing them can also be appropriately included in a text on State responsibility. The question is, of course, a highly complex and delicate one. The taking of countermeasures can give rise to abuses and would probably be even more likely to do so if one yielded to the temptation to establish a less strict regime for resort to countermeasures in response to a State crime.

France

France proposes that this article be deleted.

United Kingdom

Draft article 51 says nothing of substance.

Article 52. Specific consequences

Austria

Austria still prefers that article 19 be deleted together with its legal consequences which are dealt with in articles 51 to 53.

See also article 19.

Czech Republic

The draft still contains by no means negligible specific elements relating to the regime of responsibility for crimes that justify the distinction made in article 19 ... Then there is article 52, which contains provisions dealing specifically with "crimes" and concerns restitution in kind and satisfaction. Moreover, one form that satisfaction can take is the initiation of criminal proceedings against individuals who have taken part in the preparation or commission of a wrongful act by a State. In the case of a "delict", the State that is the source of the internationally wrongful act is itself supposed to bring the criminal proceedings. In the case of at least some State crimes, that is the prerogative of the international community and of any State that has at its disposal an appropriate mechanism for the purpose. Satisfaction also represents an important point of convergence between State responsibility and individual criminal responsibility under international law.

Another suggestion would be to consider the problem of an injured State's option to choose between restitution in kind and compensation. This option exists in respect of "delicts", but the Czech delegation questions whether it should be retained as such in the case of "crimes". Surely one must ask whether it is even possible, in the case of a "crime", for an injured State somehow to consolidate the consequences of a breach of a peremptory norm of essential importance for safeguarding the fundamental interests of the international community by agreeing to compensation instead of insisting on restitution in kind. Might it not be preferable to stipulate that compensation would be permissible in the case of a "crime" only when it was accompanied (where appropriate) by restitution in kind, for which it could be substituted only in cases where it was materially impossible to revert to the status quo ante (or even, where appropriate, in cases where it was not possible for the reasons set out in subparagraphs (b) to (d) of article 43)?

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The concept of proportionality pervades the whole field of remedies as stated in the Commentary to article 52, subparagraph (a), but may nevertheless be restated in connection with this particular provision.

France

France proposes that this article be deleted.

Switzerland

The distinction [between international crimes and international delicts] is meaningless unless the consequences entailed by the two categories of violations are substantially different. Article 52 of the draft governs the consequences of international "crimes" committed by States. It prescribes that the limitations imposed by article 43, subparagraphs (c) and (d), on the right to obtain restitution in kind – which, it must be added, is impossible in a number of cases – do not apply to these "crimes". In other words, the injured State could demand *restitutio in integrum* even if this imposed a disproportionate burden on the State which had committed a wrongful act (article 43, subparagraph (c)) or threatened the political independence or economic stability of that State (subparagraph (d) of the same article). These distinctions are either inadequate or dangerous: dangerous because, in the opinion of the Swiss delegation, the abeyance of article 43, subparagraph (d), in the context of "crimes", as prescribed by article 52, subparagraph (a), raises the possibility of inflicting serious punishment on an entire people for the wrongdoing of its Government, thereby compromising international security and stability.

United Kingdom

Draft article 52 sets out the particular consequences of designating conduct as an international crime. The injured State could demand restitution even if it imposed a disproportionate burden on the wrongdoing State compared with the burden of a demand for compensation, and even if it would seriously jeopardize the political independence or economic stability of the wrongdoing State (draft article 43, subparagraphs (c) and (d)); and it could demand satisfaction that would impair the dignity of the wrongdoing State (draft article 45, paragraph 3).

In the view of the United Kingdom, the interests of international peace and security demand that restitution which would be disproportionately burdensome or would seriously jeopardize the independence and stability of the wrongdoing State, or satisfaction that would impair its dignity, should not be an entitlement of the injured State. Nor is it desirable that tribunals be empowered to order such measures. Those consequences must be appraised in a political context.

It is likely that the perception of the dangers that would flow from unrestrained demands for restitution or satisfaction would influence the characterization of a wrong as a crime or delict. If the imposition of demands for unrestrained reparation on the wrongdoer

carries a clear risk of serious disruption in international affairs, there is likely to be considerable reluctance to characterize wrongs as crimes.

Moreover, the scheme could scarcely work. If the wrong were designated as a crime, the injured State might be entitled to demand unrestricted restitution or satisfaction. The wrongdoer is unlikely to agree to this in bilateral negotiations; and a tribunal judging the matter will ordinarily decide in accordance with its own rules and in exercise of its own discretion what the proper form and measure of reparation should be. The "right" to reparation is unlikely to lead to negotiated settlements or to judicial awards significantly different from those which would arise under the present law, where there is no distinct category of international crimes and where each delict is judged on its own terms. The only foreseeable difference would be that certain wrongs would be labelled as "international crimes". Whether that be a unilateral decision by each State, or the culmination of consideration of the matter by various international organs, labelling the wrong as a crime seems too small a reward (likely in any event to be lost in the rhetoric which surrounds serious breaches of international law) to warrant the establishment of this new and controversial category of international wrongs.

Article 53. Obligations for all States

Austria

Austria still prefers that article 19 be deleted together with its legal consequences which are dealt with in articles 51 to 53.

See also article 19.

Czech Republic

As for the rest, the draft still contains by no means negligible specific elements relating to the regime of responsibility for crimes that justify the distinction made in article 19 ... Lastly and most importantly, there is draft article 53, which reflects the specific nature of the regime of responsibility for "crimes" very clearly.

France

France proposes that this article be deleted.

Article 53 relates to the obligations incumbent on all States when a State commits an international crime. It establishes a kind of "collective legal security" on the legislative level without drawing any consequences of an institutional nature and, in so doing, poses the delicate question of the institutionalization of the response to the "crime" outside the United Nations.

Such an article gives rise to numerous difficulties:

- By risking encouraging States to have recourse (at times wrongly) to countermeasures in defence of what the draft articles call the "fundamental interests of the international community";

– By affording the whole "international community", by virtue of the introduction of the concept of "crime", the possibility of engaging in an *actio popularis* and reacting collectively to the wrongdoing; this is not without danger. One of the functions of public international law is, in fact, to avoid tension. It is not certain, however, that an *actio popularis* is the most appropriate mechanism to prevent tension. On the contrary, it may be feared that such a mechanism might lead to a continuing public debate as to who complies with, or fails to comply with, public international law. Such a mechanism is, however, not part of positive law and would in any case be difficult to bring into operation.

United Kingdom

Draft article 53, which sets out the duty not to recognize as lawful or assist in the maintenance of the situations created by crimes, etc., appears to add little or nothing to the consequences of other draft articles.

Part Three
Settlement of disputes

Austria

Given the general reluctance of States to undergo obligatory dispute settlement procedures, my delegation still has some doubts regarding the efficiency of the system provided for in the draft articles.

Austrian delegations to international codification conferences are known for consistently advocating systems promoting the settlement of disputes among States. In the particular case of State responsibility, however, the danger exists that dispute settlement procedures, in particular those of an obligatory nature, may not work in practice. From the Austrian point of view, the ILC should, therefore, refrain from including part three in the draft articles altogether. The procedure in article 48 could instead retain the obligation to negotiate and contain a reference to existing dispute settlement procedures under international law applicable between the injured and the injuring State. As radical as such an approach may seem from a dogmatic point of view, State practice seems to support it as a more realistic one.

Czech Republic

With regard to the provisions of part three, concerning the settlement of disputes, it would be preferable if the procedures set out were optional in nature and could be simplified, given that the scope of the draft articles covers the whole area of State responsibility and thus a large share of potential disputes between States. In this connection the Czech Republic feels it necessary to reiterate its position that the Commission has not yet found a way to prevent a potential conflict between the procedures set out in part three and those that may be applicable under other instruments in force between the States concerned and which might provide for different means of settling disputes, including different sequences or conditions for their activation. It would be desirable for the Commission to devote due attention to this problem during the second reading of the draft articles. In any event, the contents of part three should, in our view, be structured taking into account the form the draft may ultimately take. Accordingly, it would probably be premature at the current stage to take any decisions on a whole series of possible options in this area ranging from a modification of the contents of part three to their inclusion in a separate optional protocol or their outright deletion.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries can accept the general outline of this part of the draft articles including the two annexes on the establishment of a Conciliation Commission and an Arbitral Tribunal, respectively. We note, however, that the Commission itself had recognized the need to consider the problem of the coexistence of dispute settlement obligations under part three of the draft on State Responsibility with any dispute settlement obligations originating in any other instruments and we encourage the Commission to do so.

In national law, in Community law governing the relations between the States members of the European Community and even in certain branches of international law, none of the

parties to a dispute can take the law into their own hands. A compulsory third-party settlement procedure has been introduced into those legal systems to make sure that disputes are solved in a peaceful and civilized manner. In the view of the Nordic countries, a serious attempt should be made to further develop and bolster the international legal order with effective settlement procedures.

France

Part three of the draft articles has the effect (no doubt intentional) of instituting a mandatory jurisdictional settlement of all disputes. There is, however, no reason to single out disputes giving rise to questions of responsibility by applying an ad hoc settlement mechanism to them. Moreover, in most cases there is no isolated dispute relating to responsibility. There are, on the other hand, disputes on matters of substance which have consequences relating to responsibility. That is, indeed, the case with the majority of such disputes.

France does not see why there should be a specific settlement mechanism for disputes related to responsibility. It would be preferable to leave them to general international law. Failing the deletion of part three, one possible solution would be to transform it into an optional protocol.

In the opinion of France, part three relates more to the work of a diplomatic conference than to one of codification. It will be recalled that the procedure for the settlement of disputes which appears in the annex to the 1969 Vienna Convention on the Law of Treaties was introduced during the diplomatic conference which specified the purpose of the Convention, and not by the International Law Commission. The machinery provided for in the Vienna Convention is, moreover, clearly more respectful of the will of States than that envisaged here. Lastly, it is at the very least premature to include a part three concerning the settlement of disputes when it is not yet certain that the draft articles will become a convention.

...

France considers that part three of the draft should be deleted. Therefore, it is not proposing any changes in the wording of the provisions of articles 54 to 60 or of annexes I and II.

Germany

It is the view of the German Government that, given the multitude of global and regional, multilateral and bilateral mechanisms for conciliation, arbitration and judicial review that are already in place but are unfortunately only rarely used by States, existing mechanisms should be used first, in particular if there already exists a special dispute settlement regime applying to the substantive primary law whose breach is alleged. Part three on dispute settlement should thus be expressly designated a residual, subsidiary role vis-à-vis existing mechanisms and procedures.

Ireland

The Government of Ireland is of the view that part three should be optional rather than an integral part of the text. There are a number of reasons for this view.

First, as mentioned above, we believe that many States will be unwilling to subscribe to such dispute settlement provisions, and if the provisions were to be an integral part of the text, or if, in the event that the draft articles were to be adopted in the form of a treaty, no reservations were to be permitted in respect thereof, this would jeopardize the acceptance by those States of other draft articles which they would be willing to accept. Given the centrality of the topic of State responsibility to the system of international law, the Government of Ireland favours the maximum possible acceptance by States of the draft articles and is of the opinion that there should be the possibility for States to opt out of provisions such as these which are controversial in order to maximize the acceptance of the other provisions.

Secondly, as we understand it, the focus of the Commission's work on this topic has been on the codification and development of the rules relating to State responsibility. The settlement of disputes relating to the interpretation and application of these rules is an ancillary matter which should not be allowed to detract from the Commission's focus.

Thirdly, internationally wrongful acts giving rise to State responsibility may occur in any area of the law, and the attempt to devise a dispute settlement regime of a general character at the current time in this context could be seen as misplaced. While we appreciate that the Commission's proposals in this regard would not take priority over other dispute settlement provisions whether of a general or a specific character agreed by States, it may be wise to examine in greater depth and separately the question of dispute settlement, including the relationship between various regimes.

Mexico

The Government of Mexico greatly appreciates and commends the Commission on its work on the settlement of disputes developed in part three of the draft articles. In view of the importance attached by Mexico to this topic, and with a view to strengthening the chapter, which we regard as fundamental to the promotion of peaceful coexistence among peoples, we would suggest that the Commission should attach greater importance to this area ...

...

We suggest, for the Commission's consideration, the inclusion of an optional protocol, intended, should other means of settling disputes not succeed, to allow election for a compulsory arbitration mechanism or appeal to the International Court of Justice.

Mongolia

Mongolia finds the provisions on the settlement of disputes to be acceptable. It does not share the view that they constitute somewhat overly detailed provisions that lack flexibility. Mongolia believes that they reflect in general the principle that parties to a dispute should be allowed to choose freely the means of settlement. More thought, however, needs to be devoted to the link between the settlement of disputes and countermeasures.

Switzerland

With regard to the peaceful settlement of disputes in respect of the interpretation or application of the provisions of the convention which could result from the Commission's draft, the Swiss delegation wishes first of all to congratulate the International Law Commission and its Special Rapporteur, Mr. Arangio-Ruiz, for the thoroughness with which it has studied this particular problem. Switzerland is satisfied with the provisions on the settlement of disputes with respect to countermeasures. Unfortunately this satisfaction does not extend to the *general* arrangements for settling disputes which the draft provides for. No doubt the introduction of a conciliation procedure that may be invoked unilaterally in the event of negotiations breaking down is to be welcomed. But in a field as quintessentially legal as international responsibility, that is not enough. If a future convention in this field is to be as effective as one would wish, each State concerned must be able to launch a judicial process culminating in a binding verdict when conciliation fails. Unless that happens, the work currently under consideration will remain half unfinished.

United Kingdom

It has already been indicated that the United Kingdom does not support the retention of part three of the draft articles, dealing with the settlement of disputes, and that this has nothing to do with the desirability of compulsory procedures for the settlement of disputes as such. The fact remains, however, that dispute settlement procedures are not a necessary part of a set of legal provisions on State responsibility: the second can be complete without the first. The United Kingdom observes moreover that a settlement of disputes regime, however desirable in itself, takes on an entirely different aspect if allied with a set of legal rules as fundamental to the whole system of international law as the rules governing State responsibility. The resulting situation would be very different from the inclusion of dispute settlement provisions in a bilateral or multilateral treaty creating substantive legal obligations. There the scope and nature of the area of relations falling under the dispute settlement clauses is foreseeable in advance. In the present case, practically every international dispute could be cast in terms of a dispute concerning the nature and extent of the international responsibility of a respondent State for the actions of which complaint is made. The draft articles set out principles of State responsibility of general application. Those principles, and the dispute settlement obligations that are appended to them in part three of the current draft, would be applicable in every international dispute, unless their application were specifically excluded. The United Kingdom feels bound to note that that would be a utopian outcome, but hardly one to be realistically envisaged in the current state of international relations. The inclusion of a general and open-ended commitment to international dispute jurisdiction can only reduce by a significant margin the likelihood that the draft articles will secure the necessary widespread acceptance by States.

Finally, what part three in its present form would bring about would be compulsory conciliation for practically all international disputes and compulsory arbitration for all disputes arising out of a resort to countermeasures. The United Kingdom must question whether that would represent a satisfactory choice of method or forum for so wide-ranging a potential class of disputes. The only tribunal which (in the United Kingdom's view) would be capable in principle of meeting the challenge of so wide a range of international disputes would be the International Court of Justice. But the truth remains that the class of disputes to which part three would apply is simply too wide to lay down, prescriptively, a unique mode of settlement.

It remains only to note that if (as the United Kingdom has urged above) the final outcome of the exercise is not an international convention, the idea of an additional section on the settlement of disputes automatically falls away, since compulsory dispute settlement procedures would require a legal instrument by which States formally consent to be bound. That would not however preclude the adoption, simultaneously with the final version of the Commission's draft, of a strong recommendation to States to settle disputes that may in future arise by one or another of the binding mechanisms that are available to them. The United Kingdom would in fact urge that such a course be considered.

...

As was indicated above, the United Kingdom Government is unequivocally opposed to the inclusion in these draft articles of the provisions of part three on the settlement of disputes.

There may be some point in a simple restatement of the obligation of States to settle disputes peacefully by means of their own choosing. It may also be possible for the Commission to identify very specific areas arising under the draft articles in which States might undertake obligations to pursue particular dispute settlement processes. For example, if (contrary to the view favoured by the United Kingdom Government) the detailed provisions on countermeasures were retained, and the link between the substantive provisions on countermeasures and dispute settlement procedures retained with them, it might be necessary for the Commission to attempt to find a workable dispute settlement process to replace that in the current part three. The United Kingdom Government does not, however, consider that there is a useful role in the draft articles for any scheme as ambitious and wide-ranging as that in the present part three.

United States

Part three of the draft articles recognizes that negotiation (article 54), good offices and mediation (article 55) and conciliation (article 56) all play an important role in international dispute settlement. However, the articles go further by making the resort to such tools binding at the request of any State party to a dispute (though the recommendations of the Conciliation Commission may not be binding, participation by both parties seems to be required).

While the attempt to advance the cause of peaceful settlement of disputes is laudable, the United States sees several serious problems in the framework set forth in the draft articles. What is most important, to the extent that the draft articles compel resort to such modes of dispute settlement, this framework does not reflect customary international law. Indeed, such a system is unlikely to find widespread acceptance among States. Further, a mechanism designed to meet all possible disputes would not meet the very real differences that arise under the law of State responsibility. Thus, this system likely will be ineffective in resolving many disputes. Finally, such procedures, especially those relating to the conciliation process, are slow and expensive, imposing possibly long delays and high costs. Rather than requiring such a procedure, the draft should allow States, upon mutual agreement, to resort to such mechanisms.

...

The United States believes that the long-term credibility of a code of State responsibility would be undermined by linking it to a mandatory system of dispute settlement that imposes potentially high costs on States, is ignored by States or, even worse,

is seen as unbalanced in its treatment of wrongdoing and injured States. The dispute settlement provisions should be deleted in favour of a single non-binding provision that encourages States to negotiate a resolution of their disputes, if necessary by resort to mutually agreeable conciliation or mediation, or to submit to procedures under existing agreements, or to submit by mutual agreement their disputes to binding arbitration or judicial decision.

Article 54. Negotiation

France

Should part three of the draft articles be retained, which does not seem advisable, France would wish to make the following comments:

The usefulness of article 54 is open to question. The term "amicably" is either unnecessary (to negotiate "amicably" is a tautology) or dangerous (in that it might allow the law to be set aside, contrary to what is stated elsewhere in the draft articles). It would, in any event, be necessary to integrate consultations into the negotiating machinery. More fundamentally, there is no clear distinction between the disputes of concern here: do they relate only to countermeasures or to the interpretation and application of the text as a whole? It will be recalled that chapter III, in part two, relating to countermeasures, already establishes an obligation to negotiate as well as a procedure for the settlement of disputes (article 48).

Article 55. Good offices and mediation

France

As with article 54, the utility of article 55 is open to question.

Mexico

There should be clarification that the procedure established under article 55 is parallel to the compulsory formal negotiation procedure.

Article 56. Conciliation

France

The period of three months provided for in article 56 is too short.

Mexico

Mexico welcomes in particular the establishment of conciliation as a compulsory measure should other means of achieving a diplomatic solution fail.

Article 57. Task of the Conciliation Commission

France

The Conciliation Commission resembles a commission of inquiry rather than a genuine conciliation commission. The principle whereby the Commission could undertake an independent inquiry within the territory of any party to the dispute is unacceptable since the aim is to establish a mandatory inquiry mechanism which is not in keeping with the optional character of conciliation.

Mexico

Mexico reiterates the appropriateness of taking up the topic of precautionary measures, which could be proposed by the Conciliation Commission, and, where necessary, handed down by the Arbitral Tribunal.

Paragraph 2

Mexico

The obligation of parties to assist the Conciliation Commission in determining the facts which are the cause of the dispute should be specified.

Paragraph 4

France

The period provided for in paragraph 4 is also too rigid. It would have been preferable to have provided for a "reasonable period". The drafting of the annex to the 1969 Vienna Convention on the Law of Treaties might serve as a useful reference.

Article 58. Arbitration

France

France considers the article unacceptable in that, in reality, its aim is to establish a mandatory arbitration mechanism. States cannot be obliged to submit disputes between them to an arbitral tribunal. That is contrary to the very principle of arbitration, which is based solely on the will of States.

Paragraph 1

United States

The provision of an arbitral tribunal under paragraph 1, to which parties may "by agreement" submit their disputes, is unexceptional but unnecessary for the draft articles

to function effectively. If, for instance, States are willing to agree to submit their dispute to an international tribunal, they may establish such a tribunal on their own accord or with the assistance of a third party (a disinterested State or international organization, for instance). The United States would support an optional set of dispute settlement procedures for States to follow if it would help them to resolve disputes.

See also article 48.

Paragraph 2

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

It is further noted that the only binding element of the whole third-party settlement scheme relates exclusively to disputes relating to the legitimacy of countermeasures already adopted by the allegedly injured State as well as the underlying dispute which led the injured State to take countermeasures. That creates a certain imbalance between the right of the wrongdoing State to take the case to arbitration, whereas the injured State does not have this right when the original dispute as to the responsibility of the wrongdoing State arises. Moving the mandatory element to the stage at which countermeasures have been resorted to may amount to encouraging the use of such measures whereas the goal is to limit as far as possible the use of countermeasures, an instrument which favours strong States. Given the likelihood of disputes relating to State responsibility as well as the possible escalation of such disputes as a consequence of either party resorting to the use of countermeasures, it should be a condition for resorting to countermeasures that the wrongdoing State has not responded positively to a binding settlement of the dispute.

France

Article 58, paragraph 2, could incite a State to take countermeasures to force another State to accept recourse to arbitration. Countermeasures would thus be encouraged, rather than channelled, and disputes would thereby become more complicated. Furthermore, such a provision is not in keeping with article 48.

Germany

The German Government welcomes the Commission's proposal to include some measure of compulsory third-party involvement in the settlement of disputes. The Commission should consider whether the mandatory scheme it has introduced in part three would find the necessary support by States. Article 58, paragraph 2, is of particular importance since it tries to avoid a mutual escalation of measures and countermeasures by introducing third-party determination of the legality of countermeasures in cases where, as usual, their legality is disputed. Germany would be interested in being further informed as to whether other countries take a definite stand to support this proposal.

Mexico

The Commission is invited to undertake an in-depth analysis of paragraph 2 in view of the potential difficulty of determining which is the allegedly wrongdoing State, as well as that of a situation in which internationally wrongful acts are committed by two or more States among themselves. For its part, Mexico would propose the elimination of the paragraph.

United Kingdom

The proposal in paragraph 2 for compulsory arbitration at the option of a State that is the target of countermeasures is unacceptable. It has no basis in customary international law and is inequitable and undesirable in principle. It is inequitable that the wrongdoer should be given a right to demand compulsory arbitration when the victim of the original wrong is given no such right. It is also predictable that, were the draft paragraph to be adopted, it would lead to an increase in the use of countermeasures as States sought to provoke the wrongdoing State into referring to arbitration the dispute arising out of the original wrong.

Article 59. Terms of reference of the Arbitral Tribunal

France

The question arises of how the Tribunal could take, even implicitly, interim measures of protection "with binding effect". The International Court of Justice itself has no means of doing so.

Mexico

Mexico reiterates the appropriateness of taking up the topic of precautionary measures, which could be proposed by the Conciliation Commission, and, where necessary, handed down by the Arbitral Tribunal.

Article 60. Validity of an arbitral award

France

Article 60, which establishes a kind of extrinsic control of the validity of an arbitral award, provides for the mandatory jurisdiction of the International Court of Justice in cases where the validity of an award is challenged. This is the first time that a legal instrument in the form of a convention provides for such a mechanism. It is not acceptable in that it imposes the mandatory jurisdiction of the International Court of Justice.

Mexico

The Government of Mexico is of the view that the effectiveness of arbitral awards depends, *inter alia*, on the willingness of the State to comply with its international legal obligations, and not on adding the recourse of appeal to the International Court of Justice. If the parties are certain that the arbitral award will be *res judicata*, without the right of appeal, they will devote themselves fully to the composition of the tribunal and the conduct of its proceedings. If the Commission takes the view that the International Court of Justice is not to function as an appeals body on the substance of the case, it should consider the possible legal impact of any determination that the award was void owing to the invalidity of any act of the arbitral tribunal.

The Government of Mexico has striven for the development of peaceful means of settling international differences and has acquired positive experience which it is willing to place at the disposal of the Commission. Mexico has always complied with arbitral awards against it, even where it has disagreed with the outcome. Where awards have been in its favour, it has affirmed the validity of the law and principles involved, while leaving the door open to a diplomatic solution, thereby ensuring implementation.

United States

Draft article 60's provision of an appellate function to the International Court of Justice – couched as a challenge to the "validity of an arbitral award" – would likely discourage States from signing on to the compulsory system of the draft articles. Together with the strict limitations on countermeasures, a challenge to an arbitral body's decision would extend the period during which a State must await reparation for a wrongdoing State's violation. As it relates to countermeasures, part three suggests that a wrongdoing State might remain in breach of its obligations and yet require a variety of steps, culminating perhaps years after the original wrongdoing in a challenged arbitration and a proceeding before the ICJ. Aside from being a highly complex aspect of law enforcement, this sets up an inefficient system which will impose excessive costs on injured States.

Annex I

The Conciliation Commission

No comments or observations have been received to date.

Annex II

The Arbitral Tribunal

France

The arbitration regulations contained in annex II are far from complete. What law would be applicable by the Tribunal? On what basis would its power of inquiry rest? Further, it would be necessary to align the mandates of the Conciliation Commission and of the Arbitral Tribunal since it would be paradoxical to lay greater emphasis on the less binding technique for the settlement of disputes.